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Supreme Court of the United States

October Term, 1909.

FREDERICK WEYERHAEUSER and
JOHN A. HUMBIRD, Appellants,

vs.

HERBERT H. HOYT, Appellee.

No. ~~195~~ 24.

CHARLES D. CAMPBELL, Appellant,

vs.

FREDERICK WEYERHAEUSER and
JOHN A. HUMBIRD, Appellee.

No. ~~176~~ 12

Supplemental Brief for Appellant in No. 176, Appellee in No. 195.

M. H. STANFORD,

1910
MERRITT & HECTOR, PRINTERS,
DULUTH.

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No. 176.

SUPPLEMENTAL BRIEF.

Mr. Bunn has discussed the foregoing cases in one brief, and his entire argument is based on the following proposition, quoting from page 17 of his brief:

> "Such a selection filed and recorded, as it was, against this land in the land office, the land department has uniformly regarded as an entry and as having the same effect to segregate the land from the general bulk of public lands that any other entry has."

The foregoing construction claimed by Mr. Bunn for the land department cannot beregarded in any other light than a disregard of the law as settled by the repeated decisions of this Court.

An entry is for a specific tract of land.

Said Justice Swayne, speaking for the Court in the case of Ryan vs. Central Pacific R. R. Co., 99 U. S. 9 Otto 382; (25 Law. 305):

> "With respect to the "lieu lands" as they are called, the right gained by selection was only a float, and attached to no specific tracts."

Said Justice Miller, speaking for the Court in the case of St. Paul and Sioux City Railroad Company vs. Winona, 112 U. S. 720; (28 Law. 872):

> "Until a valid selection by the grantee is made from the lands within the indemnity limits they are entirely open to disposition by the United States or to appropriation under the laws of the United States for the disposal of public lands."

Said Justice Field, speaking for the Court in the case of Wisconsin Central Railroad Co. vs. Price County, 133 U. S. 495; (33 Law. 687):

> "Until selections were approved there were no selections in fact."

Said Justice Brown, speaking for the Court in the case of New Orleans Pacific R. Co. vs. Parker, 143 U. S. 42; (36 Law. 66):

> "As to the lands within the indemnity limits it has always been held that no right is acquired until specific parcels have been selected by the grantee and approved by the Secretary of the Interior."

The same is held in,

> Humbird vs. Avery, 195 U. S. 480; (49 Law. 286).

This doctrine is affirmed in the late case of,

> Sjoli vs. Dreschel, 199 U. S. 564; (50 Law. 311).

The only difference between the last case cited and those at bar is that the plaintiff Sjoli made a homestead entry, while Campbell and Hoyt were applicants for purchase under the Timber and Stone Act.

I think on general principles of law, the Railroad Company acquired no right as against Campbell and Hoyt

to the land in controversy. That when their respective applications for purchase were made the land was subject to entry and purchase under the Timber and Stone Act.

This Court has universally held that *when lands have once been sold by the United States and purchase money paid the lands so sold is segregated from the public domain, and are no longer subject to entry. A subsequent sale and grant of the same lands to another person will be absolutely null and void.*

Simonds vs. Wagner, 11 Otto 260; (25 Law. 91);

Works vs. Brauson, 11 Otto 260;

Frisbie vs. Whitney, 9 Wall. 76 U. S. 987; (19 L. 666);

Lytle vs. Arkansas, 9 How. 314.

Where the right to a patent has once become vested in a purchaser of public lands it is equivalent, so far as the government is concerned, to a patent actually issued. The execution and delivery of the patent after the right to it has become complete, are the mere ministerial acts of the officers charged with the duty.

Stark vs. Starr, 6 Wall. 73 U. S. 402; (18 Law. 925);

Simonds vs. Wagner, 11 Otto 260; (25 Law. 911);

Lindsey vs. Hawes, 67 U. S., 2 Black 554; (17 Law. 265);

Cornelius vs. Kessel, 128 U. S. 456; (32 Law. 482).

These cases also hold that the officers of the land department have no authority to cancel and entry unless fraudulent or unauthorized.

Nothing remained to be done in the Hoyt case except the mere ministerial act of issuing the patent. He was a purchaser entitled to a patent. The land department, without authority of law, cancelled his claim and patented the land to the appellant.

In the Hoyt case there seems to be no reason why the decision of the Court of Appeals that the defendants Weyerhaeuser and Humbird held the title to the land in controversy as trustees for the benefit of the complainant Hoyt should not be affirmed.

In the Campbell case it is established and not disputed that Campbell done all that the law required him to do and that he failed to attain his right because of the unlawful action of the officers of the land department. It differs from the Hoyt case only in degree. The officers of the land department permitted the applicant to proceed further towards the prosecution of his right in one case than it did in the other. The Campbell case should be reversed and the relief prayed for granted.

CASES CITED BY THE UNITED STATES CIRCUIT COURT OF APPEALS.

The case cited by the Court of Appeals in the Campbell case do not support the position of that court.

In Smelting Company vs. Kemp there cited the court says, after affirming the general rule as to the conclusiveness of a patent:

> "Of course, when we speak of the conclusive presumption attending a patent for lands we assume that it was issued in a case where the department had jurisdiction to act and execute it."

And again, in the same case at page 879:

> "A patent may be collaterially impeached in any action and its operation as a conveyance defeated by showing that the department had no jurisdiction to dispose of the land; that is, that the law did not provide for selling them or that they had been reserved for sale, or dedicated for special purposes or had been previously transferred to others."

Beard vs. Federy, 3 Wall. 478; (18 Law. 88), cited by the Court of Appeals, related to a Mexican land grant, and the authority of a certain board appointed by act of congress to pass upon such grants.

CASES CITED BY MR. BUNN.

The cases cited by Mr. Bunn in support of his contention that this Court did not mean that which it clearly expressed in Sjoli vs. Dreschel, and numerous other decisions of this Court to the same effect. None of the cases cited by Mr. Bunn have any application to the cases at bar.

Gertgens vs. O'Connor, 191 U. S. 237; (48 Law. 163), O'Connor's title was not derived through the land grant, but by virtue of Section 5 of an act of congress of March 3, 1887. United States Compiled Statutes 1901, p. 1595. The land was the property of the government. Selections had been made by the Railroad Company, but not approved. Ireland had acquired the right to purchase from the company certain of these lands when the Railroad Company should acquire title thereto. The act of congress in question authorized Ireland to purchase the land covered by the contract with the Railroad Company from the government, paying to the government its price, no portion of which was to go to the Railroad Company. It was this act of March 3, 1887, which cut out the claims under the settlement laws, and not the approval by the Secretary of the Interior of the selections prior thereto made by the Railroad Company.

United States vs. Detroit Lumber Company, 200 U. S. 231, was a case where the United States sought to set aside certain patents upon the ground that they were fraudulently acquired under the homestead laws. The receiver's receipts had been issued but not the patents. The only question decided in that case was that there were no circumstances disclosed which case suspicion upon those rights in the hands of the Lumber Company. That a purchaser from the patentees for value and without notice of any fraud on the part of the entryman is a bona fide purchaser within the meaning of the Timber Act of July 3, 1870, and the doctrine of relation applied.

McCreery vs. Haskell, 119 U. S. 327; (30 Law. 408), cited by Mr. Bunn in support of the rule "First in time first in right" involved lands selected by the state in part

satisfaction of Section 16 of one of the townships of the county which was within the limits of the confirmed Mexican grant.

By the Act of Congress of March 3, 1853, making public lands of California with certain exceptions subject to the general pre-emption laws of September 4, 1841, Sections 16 and 36 of each township were granted to the state for the purpose of public schools.

The land in question was within the claimed limits of a Mexican grant, and could not be identified until after they were surveyed by the surveyor general of the United States.

The Court held as follows:

> "For selections of lands in California in lieu of the school sections covered by Mexican grants, it has not been the practice of the land department to issue patents. When the selections are approved by the Secretary of Interior a list of them with a certificate of the commissioner of the general land office is forwarded to the state authorities. The list thus certified operated to convey the title to the state as fully as by patent."

The land in this case was originally granted to the state; if the land had been surveyed it would have passed by the grant. The selection was made prior in time to that of the preemption claimant and this selection vested the equitable title in the state requiring only the certificate of the commissioner of the general land office to pass th legal title, hence the decision in that case as between the state and the settler, "First in time, first in right," an altogether different title from that claimed by the Railroad Company and selected to satisfy the deficiencies in its grant.

ACT OF JULY 1, 1898.

Mr. Bunn follows the Court of Appeals in both cases in which he holds that neither Hoyt or Campbell are entitled to the benefit of that act. Mr. Bunn further declares that Campbell is not entitled to the benefit of that

act for the reasons that he has no entry of record against the land.

We claim for this Act of July 1, 1898, that it refers distinctly to three classes of persons, purchasers, settlers and claimants, who in good faith initiated their claim prior to January 1st, 1898, under any of the land laws of the United States to any lands either in the granted or indemnity limits of the Northern Pacific Railroad Company, to which the right of the grantee or its lawful successor has claimed to have attached by selection.

The contention of Mr. Bunn amounts to this: That under any and all circumstances the land department by an unlawful and unauthorized act by its officers and without authority of law may cut off the right of any claimant to any of these lands by denying to them the right to enter or pursue their entry under the land laws of the United States.

If this construction placed on the act by Mr. Bunn is held to be correct the Act of July 1, 1898, need never have been passed. Such construction means this and nothing more: That is it within the power of the land department in any and all cases to nullify the intention of congress as expressed in the act.

In each case the claim to the land was initiated in good faith prior to January 1, 1898, and in the absence of the Railroad Company's claim could have been perfected into a full title. The lands were open for sale when their respective applications were made. The claimants did everything in their power to perfect their rights and title to the land. Each by his act and effort attained a legal right to be preferred. The claim of each was good against every one but the one claiming the prior rigth, which in these cases was the Northern Pacific Railway Company only, and the Act of July 1, 1898, extinguished the claim of the Railway Company.

Mr. Bunn does not meet the following points made by Mr. Hoyt in his respective briefs:

1. There was no authority in the grant to the Railroad Company to issue patents for land on the north side of its road in lieu of lands deficient on the south side of its road and such patents are void.

2. The Northern Pacific Railway Company is not the successor of the Northern Pacific Railroad Company, and Weyerhaeuser and Humbird have not proved title in themselves to the lands in controversy.

As to the foregoing propositions, I would respectfully refer the Court to the brief of H. H. Hoyt, filed in these cases.

Dated, March 29, 1910.

M. H. STANFORD.

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Supreme Court of the United States

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vs.

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JOHN A. HUMBIRD,

Appellee.

No. 12.

Reprint of Briefs of M. H. Stanford Filed in October Term, 1910, and Reply Brief.

M. H. STANFORD,
Of Counsel for Herbert H. Hoyt and Charles D. Campbell.

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Appellee.

No. 176.

REPLY BRIEF BY M. H. STANFORD.

The defendants in these cases, and I refer to the defendants in the ~~both~~ cases, seek to distinguish the cases at bar from the long line of decisions of this court, whereby the doctrine has been established: THAT AS TO LIEU LANDS WITHIN THE INDEMNITY LIMITS OF A RAILROAD COMPANY'S LAND GRANT, NO RIGHT IS ACQUIRED BY A RAILROAD COMPANY IN ANY PARTICULAR LANDS UNTIL THE SELECTIONS MADE BY IT ARE APPROVED BY THE SECRETRY OF THE INTERIOR.

Ignoring the foregoing doctrine, the defendants contend that the filing of the selections in the local United States Land Office against particular lands constitutes an entry and has the same effect to segregate the land from the general bulk of public lands than any other has.

The opposing counsel in support of their contention, seek to confine the doctrine established by this court, as applying only to a particular class of entries and to such cases only, wherein the entryman has initiated his claim prior to the filing by the railroad company of its lists of selections in the land office. We submit:

First: That in none of the cases decided by this court as to the time when the railroad company's right to particular lands was initiated, has the question as to the class of entries been material.

Second: In none of the cases decided by this court has the question as to the date of the filing of the railroad company's selections of indemnity lands, as between it and the claimant under any one of the general land laws of the United States been material.

And we further submit, that in every case which has been before this court, where it has been necessary to decide the question, this court has held:

THAT NO RIGHT TO PARTICULAR LANDS WITHIN THE INDEMNITY LIMITS WILL ATTACH IN FAVOR OF A RAILROAD COMPANY UNTIL THE SELECTIONS MADE BY IT HAVE BEEN APPROVED BY THE SECRETARY OF THE INTERIOR. THAT UP TO THE TIME SUCH APPROVAL IS GIVEN, LANDS WITHIN THE INDEMNITY LIMITS ARE SUBJECT TO DISPOSAL OF THE UNITED STATES OR TO BE SETTLED UPON AND DISPOSED OF UNDER THE PUBLIC LAND LAWS OF THE UNITED STATES.

We therefore contend, that the complainants in the cases at bar, having made application to the local land office for the purchase of the respective parcels of land, long before the selections made by the railroad company had been approved of

by the secretary of the interior, each applicant being in all respects qualified to make application and purchase the same by complying with the provisions of the timber and stone act, so called, and were prevented from proceeding further in the acquiring of title by the unwarranted action of the land department, that the complainants by such application were under the circumstances, the first to initiate a claim to the land and therefore being first in time were first in right.

We wish to refer briefly to the acts of congress, by virtue of which the Northern Pacific Railroad Company claims title to its lands. Sufficient for our purpose are the portions of the acts quoted and appear in the brief of Mr. Charles W. Bunn in the cases at bar at pages 3 and 5.

Quoting from page 3 of his brief, Section 3 of the Act of Congress of July 2nd, 1864, says:

> "And be it further enacted, that there be and hereby is granted to the Northern Pacific Railroad Company, its successors and assigns, for the purpose of aiding, etc."

then follows the description of the lands granted, the reserves and exceptions, etc., from the grant.

Quoting further from the same section of the act:

> "and whenever, prior to said time (the time the line of said road becomes definitely fixed and a plat thereof filed in the office of the commissioner of the general land office), any of said sections, shall have been granted, sold, reserved, occupied by homestead settlers, or pre-empted, or otherwise disposed of, other lands shall be selected by said company, in lieu thereof, under the direction of the secretary of the interior, in alternate sections, etc."

Again quoting from the joint resolution of May 31st, 1870, page 5 of the brief of Mr. Bunn, we find the same language used as in the act of July 2nd, 1864, relating only to lieu or indemnity lands, it reads as follows:

> "then said company shall be entitled, under the direction of the Secretary of the Interior, to receive so many sections, etc."

As to the place land, granted lands as they are termed, there is an absolute grant: "that there be and hereby is

granted." Quite the contrary is the language of the act as to the indemnity lands, no words of grant are used; a privilege, it might be termed, is given; a right to select under the direction of the Secretary certain lands to supply its losses in the place or granted limits.

It would seem as though no more apt language could be used to express the clear intention of congress as to the right intended to be conferred on the railroad company by these acts, in relation to the two classes of land. As to the place lands, it is a present grant; and this court has established the rule, that when the line of the road has been definitely fixed and the conditions precedent have been performed, the title to the place lands vests in the railroad company by relation as of the date of the act.

As to the lieu or indemnity lands the intention of congress is equally clear as expressed in the acts under consideration. No present right is conferred in any particular lands by the act of congress, no future right is confirmed as to any particular lands, no promise of a grant as to any particular lands is made in either act of congress under consideration. Congress by said acts grants to the railroad company a privilege only, which becomes a right when the lands have been selected by it and the selections approved by the Secretary of the Interior, no right vests in the railroad company until the selection is approved and the date of the right extends no farther back than to the date of such approval. There is no room for the doctrine of relation in this case under the terms of the act so as to cut off any right initiated before the selections have been approved by the secretary, for until such approval there is no right of the company, previous to the time of such approval to which it can relate.

As regards the rights of the railroad company to any lands within the indemnity limits, as against any other claimant under the public land laws of the United States, it is not a question as to any class of entries under such laws, homestead, timber and stone or any other, the question is and must always be under the laws in question, did the opposing claimant initiate

a lawful claim to the land prior to the approval by the Secretary of the Interior of the companies selection of lieu lands?

We have cited a long line of cases in our several briefs, cases decided by this court, some of them extending back for a period of nearly forty years, construing congressional acts involving provsions for lieu or indemnity lands in aid of railroads, where the language was substantially and practically the same as that used in the Northern Pacific Railroad act and its decision by this court in every case that has come before it, where it has been necessary to decide the question has been the same; that no right to indemnity lands accrue to the railroad company until the selections made by the railroad company have been approved by the Secretary of the Interior, and from the language used by congress in these acts we cannot conceive how any other conclusion, any other construction of the congressional intent would be possible. The construction placed by this court on the language used by congress in the several acts, gives effect to the plain meaning of the words used, when they are considered in connection with all of the provisions of the act.

II.

The claim is made, that the railway company's selections, having been accepted and allowed by the local land office, segregated the land against complainants' application to enter the same so that no rights attached under that application, regardless of the validity or invalidity of the prior selection.

We would ask the gentlemen who advance this proposition to point us to a single authority which gives to the officers of the local land office power to do that, which this court has repeatedly and always held not even the Secretary of the Interior can exercise.

In Sjoli v. Dreschell, 199 U. S. 564, 50 L. 312, Justice Harlan, speaking for this court, said:

> "From the numerous cases in this court, relating to the act of July 2nd, 1864, the following propositions are to be deduced, among which propositions is the following: That the Secretary has no authority to withdraw from sale or settlement lands that are within indemnity limits, which

have not been previously selected with his approval to supply deficiency within the place limits of the company's road."

This rule has been declared by this court in a long line of decisions, among which are the Oregon & California Railway Co. v. Nelson, 189 U. S. 103; Avery v. Humbird and Weyerhauser and others cited in our briefs, also Osborn v. Forsyth, decided at the last term of this court.

The claim of our opponents, that the acceptance and filing of the company's selections by the local land officers, segregated the land against complainants' applications is based on the erroneous theory that such selections filed and recorded operated as against the land in controversy the same as an entry under the homestead and pre-emption laws.

This contention can be sustained only by ignoring the settled rule of this court, that no rights attach to lieu or indemnity lands in favor of a railroad company, until the selections made by it have been approved by the Secretary of the Interior.

III.

Our opponents invoke the doctrine of relation in support of their claim of title; they say that when the railroad company's selection was approved by the Secretary of the Interior and patents issued to the company for the land, the approval and the patent related back to the original selection and cut off all intervening claims.

Before the doctrine of relation can be applied for the benefit of the railroad title in these actions, certain fundamental principles of law declared by this court must be repudiated.

First: That the title by relation extends no further back than to the inception of the equitable right.

Husman v. Durham, 165 U. S. 144, at 148; 41 L. 664, at 665.

Second: The doctrine of relation is never allowed to defeat the collateral rights of third parties.

Johnson v. Jones, 66 U. S., 1 Black 209; 17 L. 117, at 120;

United States v. Anderson, 194 U. S. 394 (48 L. 1035 at 1039).

Third: The doctrine of relation is a fiction of law and in the construction of land grants and the public land laws the will and intent of congress must be kept in view, that and not common law gives control.

Missouri, Kan. and T. R. R. Co. vs. K. P. R. R. Co., 97 U. S. 491; 24 L. 1095 at 1097;

U. S. v. K. P. R. R. Co., 146 U. S. 570; 36 L. 1091 at 1097;

Wis. Cen. R. R. Co. v. Forsyth, 159 U. S. 46; 40 L. 71.

The railroad company could acquire no right to the land in question until the selections made by it had been approved by the Secretary of the Interior and when the selections were approved by the secretary the complainants had initiated their claims and would have perfected their title to the land except for the unauthorized action of the land department.

Not a case is cited by them which supports their claim of the doctrine of relation as applied to their claims of title.

Quoting from Musser v. M'Rae, 44 Minn. 343 at 346, cited by defendants in their brief:

> "The doctrine of relation is founded in equitbale principals and the party claiming its application must show an equity in his favor. It is a fiction of law, resorted to for the advancement of right and justice * * * although it is never allowable when it would defeat the rights of third persons."

They cite United States v. Anderson, 194 U. S. 394 (48 L. 1035), in the language of their brief, say: "is absolutely conclusive of the question now under discussion."

Quoting from the opinion of Justice White, who spoke for the court in this case (at pg. 399, S. C. R. L. 1039):

> "This results because, on this record, the rights of third parties are not involved, since the controversy concerns only the right of the United States to retain as against its grantee, the proceeds recovered by it as the

> result of a trespass upon land, after an application for the selection of such land and pending action thereon by the proper officers of the government. Under these circumstances, the case is one for the application of the fiction of relation, by which in the interest of justice, a legal title is held to relate back to the initiatory step for the acquisition of the land."

They cite United States v. Detroit Lumber Company, 200 U. S., 50 L. 499, as supporting their claim to the benefit of the doctrine of relation. In this case the court says at p. 335, L. 505:

> "A patent from the United States operates to transfer the title, not merely from the date of the patent, BUT FROM THE INCEPTION OF THE EQUITABLE RIGHT UPON WHICH IT IS BASED: Sheply v. Cowen, 91 U. S. 330, 23 L. 424."

When we recall the facts in the cases at bar and apply the doctrine of this court to such facts: the doctrine that a railroad company acquires no right to indemnity lands until its selections have been approved by the Secretary of the Interior, their claim to the benefit of the doctrine of relation seems far fetched.

Under the repeated decision of this court, the railroad had no right or claim to the lands in question as against the complainants in these actions: at the time the application was made by them to purchase the land, which under the facts in this case was the time of the inception of the complainants' equitable rights to this land.

When the selections were approved by the secretary, the equitable rights of the complainants had long before been initiated.

The record shows that the complainants did all in their power to perfect their claim and title to the land: that except for the claim asserted by the railroad company, the lands were subject to entry under the public land laws of the United States: that except for the unauthorized action of the land department they would have perfected their respective titles.

Our opponents cite a large number of cases in support of the doctrine: "THE FIRST IN TIME IN THE COM-

MENCEMENT OF PROCEEDING FOR THE ACQUISITION OF TITLE, WHEN THE SAME ARE REGULARLY FOLLOWED UP, IS DEEMED TO BE FIRST IN RIGHT."

This doctrine to us is controling in these cases, and we invoke this doctrine in support of the claims of the complainants in these actions.

From an examination of the authorities, it is clear, that the doctrine of first in time first in right is only applied in relation to the acquisition of the public lands of the United States where the respective parties occupy the same position under the law, that is each party has an equal right to acquire title to the land, by complying with the conditions precedent prescribed by the act under which he claims. In which case he who first initiates a lawful claim is first in right.

In the case of Sheply v. Cowen, cited and quoted from in the Kellog and Burr brief at page 83, said Justice Field, speaking for the court:

> "But there is another view of the case, which is equally fatal to the claim of the plaintiffs, if the land outside of the survey as retraced by Brown in 1834 could be deemed public land, open to selection by the State of Missouri from the time the survey was returned to the land office, it was equally open from that date to settlement, and consequently pre-emption by settlers, the same limitation which was imposed by law upon settlement was imposed by law upon the selection of the state. The party who takes the initiatory step in such case, if followed up by a patent, is deemed to have acquired the better right."

The case of McCreery v. Haskell, 119 U. S. 327, 30 L. 408, from which Messrs. Kellog and Burr quote, appearing on same and following page of their brief. Plaintiff claimed title by patent dated Oct. 10, 1879, from the United States issued under an alleged settlement and purchase under the pre-emption law. The defendant traced title by patent from the State of California, bearing date March 4th, 1874. The land was selected by the state in part satisfaction of section 16 of one of the townships of the county, which was within the limits of a confirmed Mexican grant.

By the act of congress of March, 1853, making public lands of California, with certain exceptions, subject to the general

pre-emption law of Sept. 4th, 1841, sections 16 and 36 of each township were granted to the state, provided the sections, before the public surveys were extended over them were not settled upon, etc. If the sections were thus settled upon, or reserved or taken by private claims, the state was authorized to select other lands in lieu thereof. The act of congress of July 23, 1866, provided that where a claim to land by virtue of a right or title derived from Spanish or Mexican authorities had been finally or thereafter confirmed and a plat thereafter within ten months after the passage of the act had not been requested after the final confirmation subsequently made, it should be the duty of the Surveyor General of the United States for California, as soon as practical, to run lines of the public survey to be extended over said lands, and to set off in full satisfaction of such grant and according to the lines of the public survey the quantity of land confirmed by such final decree and as nearly as could be in accordance therewith. "All the lands not included in such grant so set off shall be subject to the general land laws of the United States." Under this act the lands were surveyed by deputy United States surveyor and set apart to the grantees in satisfaction of the grant. The survey was approved and on the 22nd of April, 1868, the plats were filed in the district land office.

The land lying outside of this survey thus became, in the language of the act, "SUBJECT TO THE GENERAL LAND LAWS OF THE UNITED STATES." Quoting from the opinion of Justice Fields, from pg. S. C. R. and pg. 409 L.:

> "It was open to settlement with other public lands, and consequent pre-emption; and to selection by the state in lieu of the school sections within the confirmed Mexican grant. Fraiser v. O'Connor, 115 U. S. 102, 113, 29 L. 311, 3115, as between the settler and the state, the party which first commenced the proceeding, required to obtain the title if followed up, etc., is considered as being entitled to the property. In such case the rule prevails that the first in time is first in right."

In this case it appears that the state and the settler each had an equal claim on the land under the respective acts of congress. There was the promise of a grant to the state which could be initiated by the selection, which selection, however,

was required to be approved by the Secretary of the Interior. The settler on the other hand had a right to settle on the land under the pre-emption law, if the state had not already initiated its claim. The initiation of the state's claim in that case was the selection by the state. It was not a selection under the direction of the Secretary of the Interior or selection with his approval.

Both parties claimed under acts of congress and each initiated his claim as required by the act of congress. In the case at bar no right was initiated in favor of the railroad company until the selections were made under the direction of the Secretary of the Interior, that is until the selections were approved by the Secretary of the Interior, and long before this approval the complainants had initiated their respective rights in the manner shown and if the railroad company and the complainants had an equal right to the land before a right was initiated and the complainants having made application, though ineffectual, under the circumstances the complainants were first in time and therefore first in right.

There are certain exceptions to the rule invoked by opposing counsel, that: "When in fact the patent does issue, it relates back to the inception of the right of the patentee, so far as may be necessary to cut off intervening claimants, an exception is distinctly made in the cases cited by opposing council."

St. Louis Smelting Co. v. Kemp, 104 U. S. 36, 26 L. 875 cited. This was an action of ejectment, yet in this action the court declared the well settled principal: "IF THE PATENT BE ISSUED WITHOUT AUTHORITY IT MAY BE IMPEACHED IN A COURT OF LAW."

It is our contention in the cases at bar, that the patent was issued without authority, as against the complainants' rights in the land. That the land department not only had no authority to issue the patent but the Secretary of the Interior had no authority to approve of the selections of the lands involved in the cases at bar, that issuing the patents as well as the approval of selections was a mistake of law.

The cases at bar being actions in equity the rule is universal, as established by this court:

> "That after a disputed claim for any tract of public land has been heard, considered and determined, and patent therefor issued, the courts of equity have jurisdiction and will afford relief to either of the contesting parties, who may have suffered wrong, or who have been unjustly deprived of any substantial right or denied any substantial privilege."

Marquez v. Fresbre, 101 U. S. 136;

Minnesota v. Batchelder, 1 Wall. 109;

Johnson v. Towsley, 13 Wall. 72;

Hewett v. Schultz, 180 U. S. 136;

Duluth & Iron Range R. R. v. Roy, 173 U. S. 587, 43 L. 820.

The cases cited by the U. S. C. C. of Appeals in the Campbell case in support of its decision that Campbell had not placed himself in privity with the United States in title before patent issued to the railway company and therefore could not maintain a bill in equity to charge the title under the patent with a trust in his favor, have no application to the case at bar. The rule there invoked applies only where the United States itself has disposed of the land. The distinction between the two classes of cases is clearly pointed out in Hutchings v. Low (the Yosemite Valley case), 15 Wall. 77, 21 L. 82.

Said Justice Field, who spoke for this court:

> "In the case from Arkansas (referring to Lytle v. Arkansas, 9 How. 333), the right of Cloyes had been defeated by the failure of the executive officers to perform their duty under the law, he having complied fully with its provisions, except so far as he was prevented by such failure and thus having acquired a right to the title from the government. In the present case no default on the part of an executive officer is alleged or pretended. The ground of complaint is that the defendant could not acquire the title under the pre-emption laws, because congress had granted the land to the state and thus withdrawn it from sale. In the one case it is the action of an executive officer which is the ground of complaint; in the other it is the action of congress."

In the cases at bar it is the action of the executive officers which is the ground of complaint by the complainants, as it

was in the case of the D. & I. R. Co. vs. Roy, Lyttle vs. Arkansas, and others cited.

It will be remembered that the complainant Hoyt bases his claim to the land on the application of Jones, which was made at the local land office on the 17th of December, 1897. That Campbell made three applications, the first that of 1895, that this application was renewed Nov. 9th, 1896, and again renewed Dec. 7th, 1897; that all of the applications for the land in the Campbell case were rejected for the sole reason that they conflicted with the prior selections of the Northern Pacific Railroad Company filed in the land office in 1883.

When the respective applications of 1896 and 1897 were made the railroad company's selections had been cancelled by order of the Secretary of the Interior and the lands in controversy were by the same authority restored to the public domain and subject to disposal in the same manner as other public lands. Campbell through his original application of 1895 as well as by the two renewals thereof of 1896 and 1897 obtained a preference right to purchase over all others. Under the repeated decisions of this court, no interest was in the way of the attachment of this right to the land when the application of 1895 was made.

The late case of Osborn v. Forsyth, decided in March last, previously cited, affirmed the doctrine that the Secretary had no authority to withdraw from settlement and sale, lands within the indemnity limits of the grant, which selections had not before been approved by him.

Such being the rule, it is self evident that the attempted restoration by the land department of the company's selection to the records of the land office and the assumed segregation of the lands in question for the benefit of the company under its order of 1900, long after the complainants' respective applications were made was likewise ineffectual to affect the complainants' rights.

Certainly, should we see fit to adopt the line of defendants' argument and apply it to the situation of the lands in question, as shown by the records of the land department, at the time

the respective applications of 1896 and 1897 were made, such applications would cut off the alleged rights which the defendants claimed to have secured by the original filing of selections in 1883.

As to the lands involved in the Hoyt case, all of the reasons apply in support of his right that exist in the Campbell case.

December 17th, 1897, when Jones, under whom Hoyt derived his title to the land, made his aplication to the local land office, such land was subject to purchase under the timber and stone act, so called, as shown by the records in the land office; the alleged claim of the railroad company having been previously cancelled by the action of the department.

The local officers received his application and accepted their fees for its filing. On the same day notice of this filing and that the applicant would present his proofs thereunder on March 22, 1898, was issued by the register of the local land office and on the next day it was posted and published; on December 22, 1898, Jones made plenary proof and on December 10th, 1898, he bought and paid for the land in question in strict compliance with the provisions of the timber and stone act and the receiver of the local office issued the customary receipt to him, save that he wrote across it in red ink, "This receipt is issued under the order of the Secretary of the Interior, dated February 28, 1898, subject to any claim the Northern Pacific Railroad Company have to the lands herein described."

On July 12th, 1900, the Secretary restored to the records of the land department, the selections made by the company of this and other lands coterminous with the portion of the line of the railroad east of Duluth. The Secretary never approved the selections of the company of this land or of any land coterminous with the line of its railroad east of Duluth until 1905, when the Secretary sustained a decision of the Commissioner of the General Land Office that the entry of Jones should be cancelled and he subsequently caused a patent for the land to be issued to the railroad company.

Judge Sanborn, speaking for the Court of Appeals in this case, held: That Jones was a qualified entryman. The attempted withdrawals and selections of the land by the Secretary prior to his approval of the company's selections were unauthorized by law and without legal effect. The land was open to entry and purchase until he approves the selections. Jones entered, bought and paid for it before any such approval was made. That Jones, by his entry and purchase, acquired the entire beneficial ownership and the equitable right to the land in controversy and that the railroad company and its successors in interest obtained nothing under the patent but the naked legal title which they held in trust for Jones and for his successors in interest.

The opinion of Judge Sanborn is exhaustive and meets every objection advanced by the defendants in this case.

In the Campbell case, on the question of jurisdiction, the Court of Appeals dismissing the bill for want of equities in the bill. That court evidently overlooked the distinction which this court has always recognized between the failure of an executive officer to perform his duty by reason of which a party is deprived of a right and a case in which the ground of complaint is the action of congress as we have hereinbefore called to the court's attention.

The Court of Appeals held in the Campbell case that he was not entitled to the land under the provisions of Sundry Civil Act of July 1, 1898, as the beneficiaries under that act are purchasers directly from the United States, occupants of, and qualified settlers upon the land there described prior to January 1, 1898, claiming under some law of the United States or some ruling of the interior department, that Campbell was not a member of either of these classes. He had not purchased, or occupied, or settled upon, or acquired an equitable right to or an interest in the land in controversy prior to July 1, 1898.

We submit that the Court of Appeals, by this holding, committed the same error as in its holding that Campbell was not in such privity with the United States in title, before

patent issued to another as to entitle him to maintain a bill in equity to charge the title under the patent with a trust in his favor. Had Campbell been permitted by the officers of the land department to proceed with his proofs and with the necessary steps to the acquirement of title, by following the ordinary course of procedure in the department he would have been able to complete his purchase long before January 1, 1898.

The purpose of the act as declared by this court in Humbird and Weyerhauser v. Avery is sufficiently comprehensive to cover the rights of the complainants in the case at bar; Campbell as well as Hoyt each initiated his claim long before January 1, 1898, each was prevented by acquiring the legal title to the land involved by the mistake or unlawful action of the officers of the land department.

Defendants claim to be purchasers in good faith from the patentees of the government. It will be remembered that the defendants made their purchase from the railway company January 19th, 1900. The legal title at that time was in the United States, and remained in the United States until the land was patented in 1905, they therefore could not be purchasers in good faith in the sense of being bona fide purchasers so as to be entitled to the protection of chancery, a party must show that by his purchase and by the conveyance he acquired a legal title.

Hawley v. Diller, 178 U. S. 476 at 485, 44 L. 1157 at 1161.

The following is a reprint of my briefs in the above cases filed herein during the October, 1910, term of this court.

M. H. STANFORD,

Of Counsel for Herbert H. Hoyt and Charles D. Campbell.

SUPREME COURT OF THE UNITED STATES.

October Term, 1909.

No. 195.

FREDERICK WEYERHAEUSER and JOHN A. HUMBIRD,

Appellants,

vs.

HERBERT H. HOYT,

Appellee.

BRIEF OF M. H. STANFORD IN BEHALF OF HERBERT H. HOYT, APPELLEE.

This action involves the title to 40 acres of land known and described as follows:

The Southwest quarter of the Southeast quarter (SW¼ of SE¼) of Section seven (7), Township fifty-four (54) North of Range fourteen (14) West, in the Duluth Land District of the State of Minnesota.

This controversy, like that of No. 176, Campbell vs. Humbird and Weyerhaeuser, had its origin in the conflicting orders or ruling in the land department of the United States as to what was the eastern terminus of the Northern Pacific Railroad.

On December 17, 1897, Richard B. Jones, being in all respects duly qualified, tendered his application to purchase the land above described under the provisions of the Act of Congress dated June 3, 1878, and known as the timber and stone act. Accompanying his application was the usual affidavit required in such case. Jones' application was accepted and received by the officers in charge of the local United States Land Office at Duluth, and such proceedings were afterwards had on said application that the necessary proofs were taken and completed March 22, 1898, and on December 10, 1898,

Jones made payment for the land and received the usual evidence of title to the same from the receiver (Pg. 139 Record for receiver's receipt).

The foregoing allegations of the bill are admitted in the answer.

On December 19, 1898, Richard B. Jones and wife sold and conveyed the land in controversy by warranty deed for a valuable consideration to Minnie Stewart (Exhibit P, Pg. 139 Record).

On the 22nd of March, 1902, the said Minnie Stewart, with her husband, sold and conveyed the land in controversy for a valuable consideration to the complainant Hoyt (Exhibit R, Pg. 141 Record).

The claim of the Railway Company to the land in controversy is the same as in Campbell vs. Weyerhaeuser and Humbird, and is based on the selection of October 1, 1883, and the re-arranged list of April 11, 1893.

The selection was not approved by the Secretary of the Interior until October 17, 1905 (P. 135-138, Record), and the patent was issued the next day, October 18, 1905 (P. 75, Record, answer).

The land lost claimed as the basis for the selection was the Northwest quarter of the Northeast quarter ($NW\frac{1}{4}$ of $NE\frac{1}{4}$) of Section Eleven (11), Township forty-six (46), Range sixteen (16) West, Minnesota, and was situated on the South side of the Railway Company's line of railroad in the western part of the state, while the land in controversy is situated on the North side of the Company's line of railroad east of Duluth.

The deed from the Railway Company to the appellees, Weyerhaeuser and Humbird, of the land in controversy bears date January 19, 1900 (P. 201, Record), nearly five years before the Railway Company's selections were approved.

The same conflicting orders and ruling of the land department of the United States, out of which the controversy in the Campbell case arose exist and apply to the case at bar.

The United States Circuit Court of Appeals held the entire

beneficial interest and the equitable right to the land vested in Jones upon his completion of his purchase, and the railroad company and its successors in interest held the title under the patent in trust for him and his grantees.

It will be noted that the only difference between the case at bar and No. 176, is that Campbell was not permitted to make his proofs, and that his application was rejected, while in the case at bar Jones' application was accepted, his proofs received, he paid for the land, and was given the usual receiver's receipt therefor long prior to the approval by the Secretary of the Interior of the Railroad Company's selection.

My brief filed in the Campbell case, No. 176, will therefore apply to the case at bar.

Mr. H. H. Hoyt has filed a full and comprehensive brief covering all of the questions involved in this case, and I will not tax the court in the consideration of another brief in this case.

Dated, March 22, 1910.

M. H. STANFORD,
Of Counsel for Appellee.

SUPREME COURT OF THE UNITED STATES.

October Term, A. D. 1909.

No. 176.

CHARLES D. CAMPBELL,

Appellant,

vs.

JOHN A. HUMBIRD and FREDERICK WEYERHAUSER,

Respondents.

BRIEF OF M. H. STANFORD IN BEHALF OF APPELLANT.

This action involves the title to 160 acres of land situated in St. Louis County, Minnesota. The controversy had its origin in conflicting orders or rulings in the land department of the United States as to what was the eastern terminus of the Northern Pacific Railroad Company.

A statement of the case appears in the Brief of H. H. Hoyt commencing at page 53.

The appellant, Campbell, claims the right over all others to purchase the land in controversy under Act of Congress of June 3, 1878, known as the Timber and Stone Act.

The appellees, Humbird & Weyerhaeuser, claim title under and by virtue of a conveyance from the Northern Pacific Railway Company, which company claims to be the successor to the Northern Pacific Railroad Company and the basis of appellees' title is the land grant to the Northern Pacific Railroad Company by Act of Congress of July 3, 1864, and the joint resolution of congress of May 31, 1870, and the preliminary selection of the land by list filed in the land office October 17, 1883, which selection was for the purpose of indemnifying the Railroad Company for losses in its place limits. This selection list specified losses in bulk.

April 11, 1893, the Railroad Company, acting under the direction of the Secretary of the Interior, re-arranged the selection list so as to specify a particular tract lost as the basis for each selection, and in the re-arranged list there was set opposite the tract in controversy, the Southeast quarter (SE¼) of Section nineteen (19), Township one hundred and thirty-three (133), North of Range thirty-four (34) West, West of Duluth. The land claimed to be lost is situated on the South side of the line of the Northern Pacific Railroad Company in the western portion of the state, while the land involved in this action is situated on the North side of the line of the Northern Pacific Railroad Company, East of Duluth, and is known and described as the Southeast quarter of Section twenty-one, Township fifty-four, North Range Twelve, West of the Fourth Principal Meridian, within the Duluth land district of Minnesota.

The Railroad Company took no steps to claim or identify this land as a part of its indemnity until October 17, 1883, as before mentioned, when it filed its first list under said joint resolution, dated May 31, 1870, and thereafter the revised lits filed on the 11th day of April, 1893. This selection was not approved by the Secretary of the Interior until November 7, 1905, and the land was patented to the Northern Pacific Railroad Company November 13, 1905.

ARGUMENT.

It will be noted that on November 9, 1896, and December 7, 1897, the date of the two last applications of the plaintiff, the land in controversy had been restored to, and was a part of the public domain.

Campbell was prevented from acquiring title to the land by reason of the prior claim to the same by the Northern Pacific Railway Company, under its selections, and except for this claim based on said selection Campbell might have proceeded to perfect his title to the land.

The United States never has asserted any claim to the land, other than it belongs to the public domain.

Campbell claims that his rights are protected by Act of July 1, 1898, portions of which act appear in Brief of Mr Hoyt, at pages 70 and 72, and in the Brief of Mr. Bunn, commencing at page 40 and extending to page 43, but if the land is not covered by that act, Campbell claims to have a preferential right of purchase, which right was ignored by the land department, and which he believes the court will protect.

The United States Circuit Court of Appeals in affirming the decree of the lower court in this case, held that the beneficiaries of the Act of July 1, 1898, are purchasers directly from the United States or occupants of and qualified settlers upon the lands therein described prior to January 1st, 1898, under some law of the United States or some ruling of the interior department and that Campbell did not come within the act.

The appellees contend in their Brief that the purpose of the Act of July 1, 1898, was to furnish a means of adjustment of the controversy between the Northern Pacific and the settlers within its grant.

The construction placed on the Act of July 1, 1898, by the Court of Appeals and that for which the defendant in error contends, appears not only unreasonable but also unjust to a large number of claimants who without the aid of the act might have perfected their title and excluded from its benefits a large portion of the claims which congress undoubtedly had in mind at the time of its adoption.

The cardinal rule of construction is to ascertain and effectuate the legislative intent, and for this purpose where the language of the statute is in any manner ambiguous or the meaning doubtful, resort may be had to the surrounding circumstances, the history of the times and the defect or mischief which the statute was intended to remedy.

United States vs. Northern Pac. R. Co., 91 U. S. 72-79 (23 Law. 224-228);

Humbird vs. Avery, 195 U. S. 480 (49 Law. 295);

Platt vs. Pac. Ry. Co., 99 U. S. 48-64 (25 Law. 425-429);

Smith vs. Townsend, 148 U. S. 498 (37 Law. 535);

Lake Superior Ship Canal Ry. & I. Co. vs. Cunningham, 155 U. S. 354 (39 Law. 183);
Funk vs. St. Paul City Ry. Co., 61 Minn. 439.

In this connection I call attention to certain conditions relating to the indemnity lands of the Northern Pacific Railway which existed at the time of the passage of the Act of July 1, 1898. The bill was introduced after the denial by the department of an application of the Northern Pacific Railroad Company (December 13, 1897; 25 L. D. 501), for the suspension from entry and patent the remaining undisposed lands in the odd numbered sections within that part of the formerly recognized limits of the grant to said company lying east of the terminus established by the department, decision of August 26, 1896.

The order of February 28, 1898 (26 L. D. 265) was passed on the petition of the Northern Pacific Railway Company dated January 20, 1898, for a re-consideration of the decision of December 13, 1897, above referred to.

It also appears that the United States, September 3, 1897 (26 L. D. 265), had commenced action against the Northern Pacific Railroad Company in the Circuit Court of the United States for the District of Minnesota, to secure a judicial determination by the courts as to the eastern terminus of said road.

The Dougherty case in the lower courts of Wisconsin had passed against the claim of said railroad campany. A large number of suits had been instituted by the Northern Pacific Railroad Company in Minnesota, North Dakota, Montana and Washington.

The land department was confident as to the correctness of its decision, that the eastern terminus of the Northern Pacific Railroad Company was at Duluth and it resisted all efforts of the company in its desire for suspension of entry of these lands. Prior to this the lands had been restored to the public domain; the lands were applied for by persons duly qualified; some of the lands passed to patent, other were purchased prior to January 1, 1898, while a large quantity of the

lands unfit for cultivation but valuable for timber were applied for under the timber and stone law, and by reason of contests and other conflicting claims the applications were not acted upon prior to the order of suspension of February 28, 1898.

Under these conditions this law was enacted, having for its purpose and object the quieting of disputes respecting the title to lands within the Northern Pacific Land Grant and protecting settlers and other claimants under the public land laws from the claims and suits of the company, as well as to protect the company itself against loss from its grant.

Said Justice Harlan, in Humbird vs. Avery, cited:

> "Obviously, the first inquiry should be as to the object and scope of the act of 1898. Upon that point we do not think any doubt can be entertained, if the words of the act be interpreted in the light of the situation as it actually was at the date of its passage. Here were vast bodies of land, the right and title to which was in dispute between a railroad company holding a grant of public lands, and occupants and purchasers—both sides claiming under the United States. The disputes had arisen out of conflicting orders or rulings of the land department and it became the duty of the government to remove the difficulties which had come upon the parties in consequence of such orders. The settlement of those disputes was therefore, as the circuit court said, a matter of public concern. If the disputes were not accommodated, the litigation in relation to the lands would become vexatious, extending over many years and causing great embarrassment.
>
> In the light of that situation congress passed the act of 1898, which opened up a way for an adjustment upon principles that it deemed just and consistent with the rights of all concerned—the government, the railroad grantee, and individual claimants. The railroad company evinced its approval of this action of the legislative department by a prompt acceptance of the act in its entirety. By such unqualified acceptance the railroad company agreed that, so far as it had any claim to the lands in dispute, whatever the act of congress required to be done, might be done."

Said Justice Lochran, in the same case, in his opinion filed in the Circuit Court, 110 Federal Reporter 465:

> "The obvious purpose of this act was to provide a certain speedy and equitable way in which all contro-

ersies between the railroad grantee or its successors, and purchasers or settlers upon odd numbered sections within the place or indemnity limits of the land grant who claimed by color of any law of the United States or any ruling of the land department should be settled and adjusted without contest or litigation, either in the land department or in the courts. The railroad company, by its express acceptance of the act, became bound by its provisions, and obliged to carry out its terms."

Under the circumstances then existing, is there reason for the narrow construction placed on this act by the United States Circuit Court of Appeals in this case? On the contrary would it not be a natural and reasonable construction to give effect to the words of the act "*And provided further that all qualified settlers, their heirs or assigns, who prior to January* 1, 1898, *purchased or settled upon or claimed in good faith under color of title or claim of right under any law of the United States or any ruling of the interior department any part of an odd numbered section*, neither the granted or indemnity limits of the land granted to the Northern Pacific Railroad Company to which the right of such grantee or its lawful successor is claimed to have attached."

I quote from Sutherland on Statutory Construction, Section 346:

> "Statutes are seldom written in such precise and categorical terms as to point out inclusively and exclusively all their intended applications. General and more or less flexible language is used. It is construed with reference to the subject of the act, its purpose; and popular words are read and understood according to their common acceptation."

Section 347:

> "Strict construction is not a precise but a relative expression. It varies in degree of strictness according to the character of the law under construction."

Section 348:

> "The rule of strict construction is not violated by permitting the words of a statute to have their full meaning. The letter of remedial statutes may be extended to include cases clearly within the mischief they were intended to remedy, unless such construction does violence to the language used."

Judge Sutherland seems to have expressed in the foregoing quoted matter the spirit which has controlled this court in the consideration and construction of statutes in the various cases with which I am familiar.

The situation of the Northern Pacific Railroad Company and the various adverse claimants to the land at the time of the passage of the Act of July 1, 1898, was similar to that of the parties in Lake Superior Ship Canal Railway & Iron Company vs. Cunningham, heretofore cited. In that case under Act of Congress of March 2, 1889, there was declared forfeited to United States certain of the lands granted to the State of Michigan by Act of Congress in 1856 in aid of a railroad, and by the same act, that is March 2, 1889, the title to the Canal Company as to certain lands selected and certified with the approval of the Secretary of the Interior in satisfaction of a subsequent canal grant was confirmed, except lands on which there was bona fide pre-emption or homestead claims on May 1, 1888, about ten months previous to the passage of the act, which were also confirmed.

> Lake Superior Ship Canal Railway & Iron Co. vs. Cunningham, 155 U. S. 354 (39 L. 189).

At the time of the passage of the Act of March 2, 1889, the Court held that neither the plaintiff nor the defendant had any right or title to the tract in controversy; that it was only by virtue of the act of congress in question that their respective titles were acquired.

Said this Court, construing the Act of March 2, 1889:

> "The second and third sections are the troublesome parts of the act and it must be conceded that the true construction is not altogether obvious, and yet, when the situation as it existed and as it was then known to congress is considered, the meaning can be satisfactorily discerned."

This Court, after stating the various classes of claimants to the land and the circumstances under which their respective claims arose, said:

> "Congress, under the circumstances, with a view of securing an equitable adjustment of these conflicting claims, enacted the second and third sections of the act."

Without quoting further from the act, this court held that notwithstanding the words of the statute,

> "If the consideration received is still retained by the government the title of the lands thus * * * shall be and is hereby confirmed."

That the act applied to homestead as well as to pre-emption claimants, notwithstanding the proviso relating to the consideration.

The Court also held that notwithstanding the defendant did not apply at the land office to enter his land until after the first day of May, 1888, he having previous to that date been in actual occupation of the land, his title was by the act confirmed.

The Act of July 1st, 1898, when you consider the circumstances under which it was enacted and the purposes sought to be accomplished, indicate what was in the mind of congress when the bill was passed.

Its purpose was the settlement of disputes. In the language of Justice Harland, in Humbird vs. Avery:

> "If the disputes were not accommodated the litigation would become vexatious, extending over many years and causing great embarrassment. In the light of that situation congress passed the Act of 1898, which opened the way for an adjustment upon principles that it deemed just and consistent with the rights of all concerned, the government, the railroad grantees and individual claimants."

The law of 1898 is not like that of any of the land laws. It was passed for a particular purpose and when we recall that purpose it is difficult to believe that congress intended to confine its benefits to purchasers and settlers. The words "claim" and "claimant" appear frequently in this act, and the words are used as distinct and separate from "purchaser" or "settler."

The United States never has asserted any claim to the land other than it belongs to the public domain. Campbell was prevented from acquiring title to the land by reason of the prior claim to the same by the Northern Pacific Railroad Company and by the decision of the officers of the land department. Is

there any legal or equitable reason in the light of the circumstances which existed when the Act of 1898 was passed for excluding parties from the benefit of the act whose claims were initiated in good faith and only were prevented from perfecting their title by the action of the land department, and but for the claim of the railroad company?

It is a well established rule of this court that where an individual in the prosecution of a right has done that which the law requires him to do, and he has failed to attain his right by the misconduct, mistake or neglect of a public officer, the law will protect him.

> Lytle vs. State of Arkansas, 9 How. 333 (13 Law. 160);
>
> Duluth & Iron Range Railroad Company vs. Roy, 173 U. S. 587 (43 Law. 820).

The Railway Company and the defendants in this action now call for a narrow construction of the act; they ask that it be confined to settlers upon the public land. Their attitude is different than at the time the terms of the act were accepted by the company. Shortly after it had accepted the terms of the act the Railroad Company and the defendants in this action were for a wide open construction, but this their broad construction precluded every one from the benefits of the act except the railroad itself and its grantees. Soon after the passage of the act the Railway Company, by conveyance to the plaintiffs in this action, assumed to pass such interest as it had in nearly if not all of its selected lieu lands lying East of Duluth, with the effect as claimed by the defendant and the Railroad Company to withdraw or exempt all of the lands so conveyed from the operations of the act.

The Circuit Court and the Supreme Court of the United States held that this could not be done, but the company, still claiming everything in sight, conveyed certain of its lands to various parties, among which was 40 acres deeded to Chas. Dreschel. This land had been occupied by Sjoli since 1884, claiming it under the homestead law. Sjoli did not acquire his patent until June 1, 1901, the Railroad Company having contested his claim through the land office. Notwithstanding that

Sjoli had acquired his patent the company claimed a vested interest in the land by reason of its selection for lieu land filed in 1883. This court, however, held that the Railroad Company had no vested interest in the land notwithstanding its selections until such selections had been approved by the Secretary of the Interior. As a matter of fact, which is of common notoriety, this Railroad Company and the defendants in this case by contests in the various departments of the office of the Secretary of the Interior and in the courts had striven to wear out all claimants to lands in its selected list, no matter how just or equitable may have been their claim, and notwithstanding the well established rule of this court that the company acquired no vested interests in lieu lands until its selections were approved by the Secretary of the Interior.

The United States Circuit Court of Appeals in this case affirmed the decree of the lower court which dismissed the bill for want of equity and held (P. 413, Vol. 88 U. S. C. C. A.) as follows:

> "In this case Campbell was refused permission to purchase the lands he seeks. He never entered or paid for it. His right to buy was never recognized by the United States, and he was never in privity with it. One who has never by acceptance of a grant, or by settlement and improvement, or by occupation or by entry or by payment placed himself in privity with the United States in title before a patent issues to another, may not maintain a bill in equity to charge the title under the patent with a trust in his favor."

As to this proposition I beg leave to refer to the undisputed facts in the case.

It is admitted in paragraph second of the answer of the defendant, at page 69 of the record, that on the 26th day of October, 1895, Charles B. Campbell applied to the United States District Land Office at Duluth to purchase the land in question, under the provisions of the Act of Congress of June 3, 1878. That he tendered his written statement as alleged with the proper and legal fees to the register and receiver of said land office, and demanded of them to receive and file his application to purchase, and issue notice in accordance with

law, and that such application was refused by the said land office for the reason that it conflicted with the selection filed by the Northern Pacific Company. That said Campbell appealed, and the decision was rendered upon his appeal substantially as alleged in the bill.

It appears in the bill and was established by proof that Campbell renewed his application twice thereafter, with the same result as on his first application, and in each of the subsequent applications appealed, and the decision on each appeal was the same.

In the same paragraph of the answer defendant admits that a patent for the land in question was thereafter issued by the United States, and alleged that it was duly executed on the 13th day of November, 1905. The defendant admits that at the time and before the issuance of said patent to the Northern Pacific Railway Company the patentee had knowledge and notice of the claim of the plaintiff.

This, and further admissions in the answer of the allegations of the bill, clearly establish the fact that Campbell in the prosecutions of his attempt to perfect his title under the Act of 1878, has done all that which the law requires him to do, and it was by reason of the action of the officers of the land department and their disregard of the law that he failed to attain his right.

The fact was established by the undisputed evidence in the case that Campbell was in every way qualified to enter the land under the Timber and Stone Act and except for the wrongful action of the land department would have perfected his title.

The above quoted portion of the opinion by the United States Circuit Court of Appeals in this case is contrary to the rule established by this court in the case of Duluth & Iron Range Railroad Company, plaintiff in error, vs. Joseph Roy, defendant in error, 173 U. S. 587 (43 Lawyers 820). The only difference in the two cases is that Roy was a homestead claimant and Campbell a claimant under the Timber and Stone Act.

The Roy case was an action to determine adverse claims

to real estate and Roy had performed or tendered performance of all acts necessary under the homestead laws to complete his title and it was held:

> "That one who being qualified, settled upon public lands with a bona fide intention of acquiring the same, and when the plat of the survey of the township was filed, went to the land office to enter the land under the homestead laws, and on the denial of his offer instituted a contest which was pending in the general land office when the patent was issued to another by inadvertence and mistake, is entitled to relief against the title claimed under such patent."

I will quote in part the opinion in the Roy case, which includes the facts as follows:

> "The lands were patented to the State of Minnesota by the United States, as swamp and overflowed lands, and the plaintiff in error is the grantee of the state. The defendant in error claims under the homestead laws. At the time of the passage of the Act of 1860, under which the patent was issued, the lands were not swamp, wet, or overflowed, or unfit for cultivation, but were and now are, high, dry and fit for cultivation, except four or five acres in the northwest corner. In May, 1883, the defendant in error, then being qualified to do so, settled upon the lands with the bona fide intention of acquiring the same under the laws of the United States, established his residence thereon and ever since continued to be in the actual, exclusive and notorious possession, making his home there, and cultivating and improving the same. When defendant in error commenced his residence on the lands the plat of the survey of the township in which they were located had not been filed subsequently, and after it was filed, to-wit, on the 2nd of July, 1883, he went to the land office with the intention of entering the lands under the homestead laws, and made a request to do so, but the land officers informed him that there was a mistake in the survey, and that in all probability a new survey would be ordered; that numerous protests had been made against the survey which were sufficient to raise the question of its accuracy; that it was unnecessary for him to protest or file on the land, and advised him to wait until such protests were determined.
>
> He was a foreigner, did not know the English language, nor was he familiar with the laws, rules and regulations relating to the disposition of the public lands, and relief upon the representations of the officers and acted upon their advice.
>
> On the 5th of August, 1884, he discovered that the

state was claiming the lands as swamp lands, thereupon he duly made application to enter the same under the homestead laws, and tendered the fees to the local land officer. No adverse claim other than that of the state had arisen or was made to said lands, but his offer of entry was rejected on the ground that the same had inured to the state under the Act of March 12, 1860, and that his application to enter the lands had not been made within three months after the filing of the township plat in the land office.

On the 6th of August, 1884, he duly filed contest, duly appealed from the rejection of his claim, which appeal and the affidavits attached were transmitted to the commissioner of the general land office, and were by him received and filed September 1, 1884.

On the 23rd of January, 1885, and while the appeal and contest were pending, the lands, through mistake and inadvertence, were patented to the State of Minnesota. The defendants took conveyance of the lands with notice of the right, claim and interest of the plaintiff, defendant in error.

The assignments of error attack the conclusions of the state courts as erroneous, and specify as reasons * * * (e) The defendant in error is not the real party in interest and never had the legal or equitable title to the land, the United States being the only party which could attack the patent to the State of Minnesota, or invoke the action of the courts to determine its validity."

Justice McKenna, speaking for the Court at page 590 (P. 822 Lawyers), said:

"It is now too well established to need argument to support or a citation of authorities, that when a patent is obtained from the United States by fraud, mistake or imposition, the question thence arising becomes one of private right, and the courts in a proper proceeding and in execution of justice will devest or control the title thereby acquired, either by compelling a conveyance to the plaintiff or by quieting his title as against the defendants, and enjoining them from asserting theirs. Germania Iron Co. v. United States, 165 U. S. 379 (41 Law. 754); Williams v. United States, 138 U. S. 514 (34 Law. 1026). It was decided that this power extends to cases in which the patent was issued by inadvertence and mistake, the grounds relied on in the case at bar.

The plaintiff in error, however, contends that the defendant in error cannot invoke this doctrine because he is not in privity with the United States; that he has not proved or offered to prove to it, or established, or alleged even in

this case, the ultimate facts upon which alone his claim could be recognized or its validity established. In other words, that he has not made or has not offered to make final proof.

This contention is attempted to be supported by the principles announced in Bohall v. Dilla, 114 U. S. 47 (29 Law. 61); Sparks v. Pierce, 115 U. S. 408 (29 Law. 428); Lee v. Johnson, 116 U. S. 48 (29 Law. 570). The principles are that to enable one to attack a patent from the government he must show that he himself was entitled to it. It is not sufficient for him to show that there may have been error in adjudging the title to the patentee. He must show that by the law properly administered the title should have been awarded to him.

We do not question these principles, but they only mean that the claimant against the patent must so far bring himself within the laws as to entitle him, if not obstructed or prevented, to complete his claim.. It does not mean that at the moment of time the patent issued it should have been awarded to him. The acts performed by him may or may not have reached that completeness, may not have reached it, and yet justify relief, as in Ard. v. Brandon, 156 U. S. 537 (39 Law. 524); and in Morrison v. Stalnaker, 104 U. S. 213 (26 Law. 741). And because of the well established principle that where an individual in the prosecution of a right has done that which the law requires him to do, and he has failed to attain his right by the misconduct or neglect of a public officer, the law will protect him. Lytle v. The State of Arkansas, 9 How. 333 (13 Law. 160).

It would be arbitrary to apply the principle to some acts and not to others—might destroy it utterly to require the performance of all. But we are indisposed to extend the argument, because we regard Ard. v. Brandon, as decisive.

But it is urged defendant in error may not be able to make final proof, and that the land department, whose jurisdiction is exclusive, may determine the lands not to be swamp or overflowed. That would be contrary to the findings of the court, which show full qualifications in the defendant, and we cannot presume that the land department will find against that fact."

It is conceded that Campbell was prevented from acquiring his title by reason of the prior claim to the same by the Northern Pacific Railroad Company under its selections, and except for this claim Campbell could have perfected his title to the land.

If the complainant Campbell is not protected by the Act of July 1, 1898, we insist that he has a preferential right of purchase, which right was ignored by the land department.

It was held in the case of Sjoli vs. Chas. Dreschel, 199 U. S. 564 (50 Law. 311):

> "That no interest in lands within the indemnity limits of the land grant to the Northern Pacific Railroad Company made by the Act of July 2, 1864, was acquired by that company by virtue of the filing of its list of selections of such lands to supply deficieney within the place limits but such lands remained open as before to settlement or occupation under the pre-emption or homestead laws until the selections were formally approved by the Secretary of the Interior."

This is in confirmation of the repeated decisions of this court.

> Wisconsin Cen. R. R. Co. vs. Price Co., 133 U. S. 496 (33 L. 687);
>
> U. S. vs. Hiss., Kansas & T. Ex. Ry. Co., 141 U. S. 358 (35 L. 766, 771);
>
> Humbird vs. Weyerhauser, 195 U. S. 480 at 506 (49. L. 295 at 298).

The sole reason why Campbell was not permitted by the land department to perfect his title to the land was the alleged prior claim thereto of the Northern Pacific Railway Company. The selection of the land in suit was not approved by the Secretary of the Interior until the 7th day of November, 1905, and the patent therefor was issued six days thereafter. It must be apparent, therefore, that the claim of the Railway Company as against Campbell was void.

Mr. Hoyt in his brief discusses four propositions which I have not mentioned. They are as follows:

1. The lands lying East of Duluth claimed by the appellee are not within the grant of the Railway Company.

2. If they were originally within the grant the selections were cancelled by the order of July 6, 1896, and March 22, 1897.

3. Under the Act of July 2, 1864, the Northern Pacific Railway Company was limited to ten alternate sections of land

per mile on each side of its railroad wherever it passed through a state and there was no authority in the grant to issue patents for land to the Railway Company on the north side of its line of road in lieu of lands deficient on the south side of the road, and such patents are void.

4. The Northern Pacific Railway Company is not the successor of the Northern Pacific Railroad Company, and the appellees have failed to prove title to the land in suit.

I endorse each and all of the foregoing propositions, but will not take the time of the court in discussing them here, all of which are

Respectfully submitted,

M. H. STANFORD,
Counsel for Appellant.

Dated, March 22, 1910.

SUPREME COURT OF THE UNITED STATES.

October Term, 1909.

FREDERICK WEYERHAEUSER and
JOHN A. HUMBIRD,
Appellants,

vs.

HERBERT H. HOYT,
Appellee.

No. 195.

CHARLES D. CAMPBELL,
Appellant,

vs.

FREDERICK WEYERHAEUSER and
JOHN A. HUMBIRD,
Appellees.

No. 176.

SUPPLEMENTAL BRIEF.

Mr. Bunn has discussed the foregoing cases in one brief, and his entire argument is based on the following proposition, quoting from page 17 of his brief:

"Such a selection filed and recorded, as it was, against this land in the land office, the land department has uniformly regarded as an entry and as having the same effect to segregate the land from the general bulk of public lands that any other entry has."

The foregoing construction claimed by Mr. Bunn for the land department cannot be regarded in any other light than a disregard of the law as settled by the repeated decisions of this court.

An entry is for a specific tract of land.

Said Justice Swayne, speaking for the court in the case of Ryan vs. Central Pacific R. R. Co., 99 U. S. 9 Otto 382 (25 Law. 305):

"With respect to the "lieu lands" as they are called, the right gained by selection was only a float, and attached to no specific tracts."

Said Justice Miller, speaking for the court in the case of St. Paul and Sioux City Railroad Company vs. Winona, 112 U. S. 720 (28 Law. 872):

"Until a valid selection by the grantee is made from the lands within the indemnity limits they are entirely open to disposition by the United States or to appropriation under the laws of the United States for the disposal of public lands."

Said Justice Field, speaking for the court in the case of Wisconsin Central Railroad Co. vs. Price County, 133 U. S. 495 (33 Law. 687):

"Until selections were approved there were no selections in fact."

Said Justice Brown, speaking for the court in the case of New Orleans Pacific R. Co. vs. Parker, 143 U. S. 42 (36 Law. 66):

"As to the lands within the indemnity limits, it has always been held that no right is acquired until specific parcels have been selected by the grantee and approved by the Secretary of the Interior."

The same is held in,

Humbird vs. Avery, 195 U. S. 480 (49 Law. 286).

This doctrine is affirmed in the late case of,

Sjoli vs. Dreschel, 199 U. S. 564 (50 Law. 311).

The only difference between the last case cited and those at bar is that the plaintiff Sjoli made a homestead entry, while Campbell and Hoyt were applicants for purchase under the Timber and Stone Act.

I think on general principles of law, the Railroad Company acquired no right as against Campbell and Hoyt to the land in controversy. That when their respective applications for purchase were made the land was subject to entry and purchase under the Timber and Stone Act.

This court has universally held that *when lands have once been sold by the United States and purchase money paid the lands so sold is segregated from the public domain, and are no longer subject to entry. A subsequent sale and grant of the same lands to another person will be absolutely null and void.*

Simonds vs. Wagner, 11 Otto 260 (25 Law. 91);
Works vs. Brauson, 11 Otto 260;
Frisbie vs. Whitney, 9 Wall. 76 U. S. 987 (19 L. 666);
Lytle vs. Arkansas, 9 How. 314.

Where the right to a patent has once become vested in a purchaser of public lands it is equivalent, so far as the government is concerned, to a patent actually issued. The execution and delivery of the patent after the right to it has become complete, are the mere ministerial acts of the officers charged with the duty.

Stark vs. Starr, 6 Wall. 73 U. S. 402 (18 Law. 925);
Simonds vs. Wagner, 11 Otto 260 (25 Law. 911);
Lindsey vs. Hawes, 67 U. S., 2 Black 554 (17 Law. 265);
Cornelius vs. Kessel, 128 U. S. 456 (32 Law. 482);
U. S. vs. Detroit Lumber Co., 200 U. S. 335 (50 L. 505).

These cases also hold that the officers of the land department have no authority to cancel an entry unless fraudulent or unauthorized.

Nothing remained to be done in the Hoyt case except the mere ministerial act of issuing the patent. He was a purchaser

entitled to a patent. The land department, without authority of law, cancelled his claim and patented the land to the appellant.

In the Hoyt case there seems to be no reason why the decision of the Court of Appeals that the defendants Weyerhaeuser and Humbird held the title to the land in controversy as trustees for the benefit of the complainant Hoyt should not be affirmed.

In the Campbell case it is established and not disputed that Campbell had done all that the law required him to do and that he failed to attain his right because of the unlawful action of the officers of the land department. It differs from the Hoyt case only in degree. The officers of the land department permitted the applicant to proceed further towards the prosecution of his right in one case than it did in the other. The Campbell case should be reversed and the relief prayed for granted.

CASES CITED BY THE UNITED STATES CIRCUIT COURT OF APPEALS.

The case cited by the Court of Appeals in the Campbell case do not support the position of that court.

In Smelting Company vs. Kemp there cited the court says, after affirming the general rule as to the conclusiveness of a patent:

> "Of course, when we speak of the conclusive presumption attending a patent for lands, we assume that it was issued in a case where the department had jurisdiction to act and execute it."

And again, in the same case at page 879:

> "A patent may be collaterally impeached in any action and its operation as a conveyance defeated by showing that the department had no jurisdiction to dispose of the land; that is, that the law did not provide for selling them or that they had been reserved for sale, or dedicated for special purposes or had been previously transferred to others."

Beard vs. Federy, 3 Wall. 478 (18 Law. 88), cited by the Court of Appeals, related to a Mexican land grant, and the

authority of a certain board appointed by act of congress to pass upon such grants.

CASES CITED BY MR. BUNN.

The cases cited by Mr. Bunn in support of his contention that this court did not mean that which is clearly expressed in Sjoli vs. Dreschel, and numerous other decisions of this court to the same effect. None of the cases cited by Mr. Bunn have any aplication to the cases at bar.

Gertgens vs. O'Connor, 191 U. S. 237 (48 Law. 163). O'Connor's title was not derived through the land grant but by virute of Section 5 of an act of congress of March 3, 1887. United States Compiled Statutes 1901, p. 1595. The land was the property of the government. Selections had been made by the Railroad Company, but not approved. Ireland had acquired the right to purchase from the company certain of these lands when the Railroad Company should acquire title thereto. The act of congress in question authorized Ireland to purchase the land covered by the contract with the Railroad Company from the government, paying to the government its price, no portion of which was to go to the Railroad Company. It was this Act of March 3, 1887, which cut out the claims under the settlement laws, and not the approval by the Secretary of the Interior of the selections prior thereto made by the Railroad Company.

United States vs. Detroit Lumber Company, 200 U. S. 231, was a case where the United States sought to set aside certain patents upon the ground that they were fraudulently acquired under the homestead laws. The receiver's receipts had been issued but not the patents. The only question decided in that case was that there were no circumstances disclosed which cast suspicion upon those rights in the hands of the lumber company. That a purchaser from the patentees for value and without notice of any fraud on the part of the entryman is a bona fide purchaser within the meaning of the Timber Act of July 3, 1870, and the doctrine of relation applied.

McCreery vs. Haskell, 119 U. S. 327 (30 Law. 408), cited

by Mr. Bunn in support of the rule "First in time first in right" involved lands selected by the state in part satisfaction of Section 16 of one of the townships of the county which was within the limits of the confirmed Mexican grant.

By the Act of Congress of March 3, 1853, making public lands of California with certain exceptions subject to the general pre-emption laws of September 4, 1841, Sections 16 and 36 of each township were granted to the state for the purpose of public schools.

The land in question was within the claimed limits of a Mexican grant, and could not be identified until after they were surveyed by the surveyor general of the United States.

The court held as follows:

> "For selections of lands in Calofornia in lieu of the school sections covered by Mexican grants, it has not been the practice of the land department to issue patents. When the selections are approved by the Secretary of the Interior a list of them with a certificate of the commissioner of the general land office is forwraded to the state authorities. The list thus certified operated to convey the title to the state as fully as by patent."

The land in this case was originally granted to the state; if the land had been surveyed it would have passed by the grant. The selection was made prior in time to that of the pre-emption claimant and this selection vested the equitable title in the state requiring only the certificate of the commissioner of the general land office to pass the legal title, hence the decision in that case as between the state and the settler, "First in time, first in right," an altogether different title from that claimed by the Railroad Company and selected to satisfy the deficiencies in its grant.

ACT OF JULY 1, 1898.

Mr. Bunn follows the Court of Appeals in both cases in which he holds that neither Hoyt nor Campbell are entitled to the benefit of that act. Mr. Bunn further declares that Campbell is not entitled to the benefit of that act for the reason that he has no entry of record against the land.

We claim for this Act of July 1, 1898, that it refers dis-

tinctly to three classes of persons, purchasers, settlers and claimants, who in good faith initiated their claim prior to January 1st, 1898, under any of the land laws of the United States to any lands either in the granted or indemnity limits of the Northern Pacific Railroad Company, to which the right of the grantee or its lawful successor has claimed to have attached by selection.

The contention of Mr. Bunn amounts to this: That under any and all circumstances the land department by an unlawful and unauthorized act by its officers and without authority of law may cut off the right of any claimant to any of these lands by denying to them the right to enter or pursue their entry under the land laws of the United States.

If this construction placed on the act by Mr. Bunn is held to be correct the Act of July 1, 1898, need never have been passed. Such construction means this and nothing more: That it is within the power of the land department in any and all cases to nullify the intention of congress as expressed in the act.

In each case the claim to the land was initiated in good faith prior to January 1, 1898, and in the absence of the Railroad Company's claim could have been perfected into a full title. The lands were open for sale when their respective applications were made. The claimants did everything in their power to perfect their rights and title to the land. Each by his act and effort attained a legal right to be preferred. The claim of each was good against every one but the one claiming the prior right, which in these cases was the Northern Pacific Railway Company only, and the Act of July 1, 1898, extinguished the claim of the Railway Company.

Mr. Bunn does not meet the following points made by Mr Hoyt in his respective briefs:

1. There was no authority in the grant to the Railroad Company to issue patents for land on the north side of its road in lieu of lands deficient on the south side of its road and such patents are void.

2. The Northern Pacific Railway Company is not the

successor of the Northern Pacific Railroad Company, and Weyerhaeuser and Humbird have not proved title in themselves to the lands in controversy.

As to the foregoing propositions, I would respectfully refer the court to the brief of H. H. Hoyt, filed in these cases.

Dated, March 29, 1910.

M. H. STANFORD.

Supreme Court of the United States

OCTOBER TERM, 1910.

FREDERICK WEYERHAEUSER and JOHN A. HUMBIRD,

Appellants,

vs.

HERBERT H. HOYT.

No. 24.

Office Supreme Court U.
FILED
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JAMES H. McKENNEY,
Clerk

CHARLES D. CAMPBELL,

Appellant,

vs.

FREDERICK WEYERHAEUSER and JOHN A. HUMBIRD.

No. 12.

NORTHERN PACIFIC RAILWAY COMPANY,

Plaintiff in Error,

vs.

FRED WASS and PAULINE WASS.

No. 181.

BRIEF FOR APPELLANTS IN No. 24, APPELLEE In No. 12 AND PLAINTIFF IN ERROR IN No. 181.

CHARLES W. BUNN.

Supreme Court of the United States

OCTOBER TERM, 1910.

FREDERICK WEYERHAEUSER and JOHN A. HUMBIRD,

Appellants,

vs.

HERBERT H. HOYT.

No. 24.

CHARLES D. CAMPBELL,

Appellant,

vs.

FREDERICK WEYERHAEUSER and JOHN A. HUMBIRD.

No. 12.

NORTHERN PACIFIC RAILWAY COMPANY,

Plaintiff in Error,

vs.

FRED WASS and PAULINE WASS.

No. 181.

STATEMENT OF FACTS.

The three cases above entitled are so far alike that they will be discussed in one brief. The Hoyt and Campbell cases are appeals from the United States Circuit Court of Appeals for the Eighth Circuit (re-

ported below 161 Fed. Rep. pp. 324 and 332 respectively.) The Wass case is a writ of error to the Supreme Court of Minnesota. The decision of that court followed the decision of the Circuit Court of Appeals in the Hoyt case and is reported 104 Minn. 411. The cases were argued at the last term and have been ordered restored to the docket for reargument.

Hoyt claims forty acres and Campbell one hundred and sixty acres of land in Minnesota under the timber and stone law and Wass claims one hundred and sixty acres of land in the same state under the homestead law. Weyerhaeuser and Humbird are purchasers from the Northern Pacific Railway Company. They claim the lands involved in the Hoyt and Campbell cases under the acts of Congress making grants to the Northern Pacific Railroad Company; and the Northern Pacific claims the land involved in the Wass case under the grants made to the Territory of Minnesota by the act of Congress approved March 3, 1857 (11 Stat. 195) and the act of Congress approved March 3, 1865 (13 Stat. 526) as amended by the act of Congress of March 3, 1871 (16 Stat. 588). All three parcels of land were, by the land department of the United States, decided to belong to the railroad grants and patent for reach parcel was issued and delivered to the Railway Company. The Hoyt and Campbell cases were commenced by bills in equity in the Circuit Court of the United States; in the Hoyt case the prayer is to charge Weyerhaeuser and Humbird as trustees of the legal title and to compel them to convey, whilst in the Campbell case alternate relief is also prayed, namely, that the patent be canceled so as to leave title in the United States open to plaintiff's application to

purchase. The Wass case is an action of ejectment brought in the state court by the Railway Company against Wass to recover possession of the premises. In the Hoyt and Campbell cases the record shows over $2,000 to be involved in each suit.

We can best explain the facts to the court by stating the Hoyt case and differentiating the Campbell and Wass cases. The following statement of facts in the Hoyt case applies to all the cases, except as otherwise specified, and our references to the record, except where otherwise stated, are to the transcript in the Hoyt case.

Hoyt asserts that his grantor entered the land under the timber and stone law, which provides for a cash purchase and does not require settlement, and that the United States illegally denied his entry and patented the land to the Northern Pacific Rail*way* Company (successor of the Northern Pacific Rail*road* Company) which conveyed to Weyerhaeuser and Humbird.

The land lies in Minnesota within what is known as the "second indemnity limits" of the Northern Pacific Railroad Company. Let us explain what the "second indemnity limits" are:

Sec. 3 of the Northern Pacific Railroad charter of July 2, 1864, says:

> "*And be it further enacted*, that there be, and hereby is, granted to the 'Northern Pacific Railroad Company,' its successors and assigns, for the purpose of aiding in the construction of said railroad and telegraph line to the Pacific coast, and to secure the safe and speedy transportation of the mails, troops, munitions of war, and public stores, over the route of said line of railway, every alternate section of public land, not mineral,

> designated by odd numbers, to the amount of twenty alternate sections per mile, on each side of said railroad line, as said company may adopt, through the territories of the United States, and ten alternate sections of land per mile on each side of said railroad whenever it passes through any state, and whenever on the line thereof, the United States have full title, not reserved, sold, granted, or otherwise appropriated, and free from preemption, or other claims or rights, at the time the line of said road is definitely fixed, and a plat thereof filed in the office of the commissioner of the general land office; and whenever, prior to said time, any of said sections or parts of sections shall have been granted, sold, reserved, occupied by homestead settlers, or preempted, or otherwise disposed of, other lands shall be selected by said company in lieu thereof, under the direction of the Secretary of the Interior, in alternate sections, and designated by odd numbers, not more than ten miles beyond the limits of said alternate sections * * *"

This law granted *in the states* the odd sections in a strip of country forty miles in width (twenty on each side of the railroad), which strip of country is called the "place limits," or "granted limits."

It established on each side of the place limits an indemnity belt ten miles in width, within which might be made good by selection lands lost to the company in the place limits. It says, "other lands shall be selected by the company in lieu thereof, *under the direction of the secretary of the interior*, in alternate sections and designated by odd numbers." This language creates what are called the "first indemnity limits."

Under this act place land losses, wherever occurring, were to be made good *anywhere* within the indemnity belt, regardless of state or territorial lines.

And it is admitted law that the losses so to be made good include place lands reserved or disposed of by the United States, or covered by claims, *either before or after the passage of the act,* down to the date of definite location of the railroad.

By the joint resolution of May 31, 1870, amending the Northern Pacific grant of 1864 it is provided:

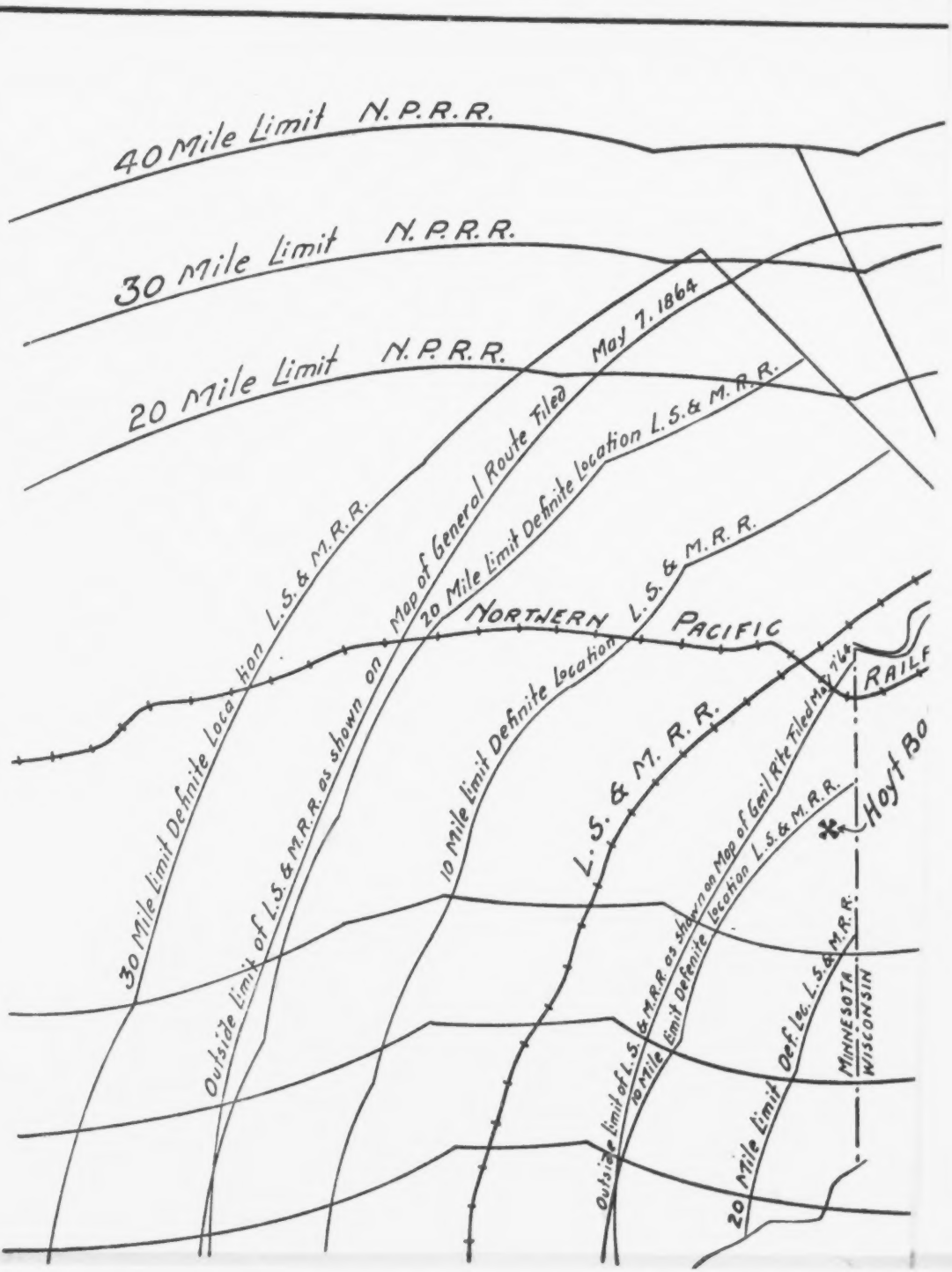
> "And in the event of there not being in any state or territory, in which said main line or branch may be located, at the time of the final location thereof, the amount of lands per mile granted by congress to said company, within the limits prescribed by its charter, then said company shall be entitled, under the directions of the Secretary of the Interior, to receive so many sections of land belonging to the United States, and designated by odd numbers, in such state or territory, within ten miles on each side of said road beyond the limits prescribed in said charter, as will make up such deficiency, on said main line or branch, except mineral and other lands as excepted in the charter of said company of eighteen hundred and sixty-four, to the amount of lands that have been granted, sold, reserved, occupied by homestead settlers, preempted, or otherwise disposed of subsequent to the passage of the act of July two, eighteen hundred and sixty-four * * *"

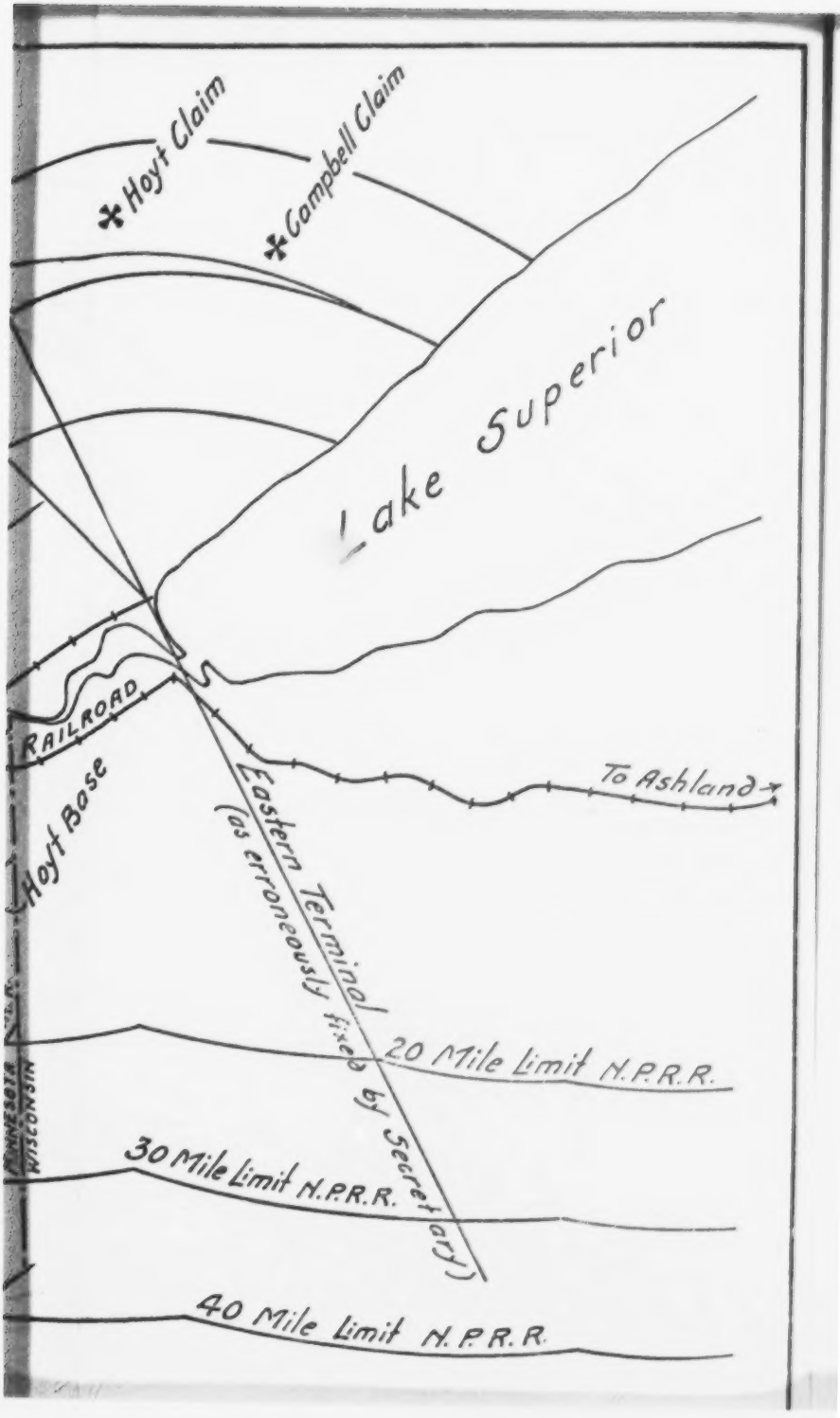
This resolution established "second indemnity limits," viz., two strips of land each ten miles wide, one lying on each side of the road outside the "first indemnity limits." The second indemnity region is unlike the first in this: (a) it can be resorted to only for losses *in the same state or territory;* and (b) only for losses occurring *after* the act of July 2, 1864, and prior to definite location.

The title of the Railroad Company to indemnity lands within either indemnity "limit" rests upon *selection approved by the Secretary of the Interior. Humbird v. Avery,* 195 U. S. 480.

The land in suit was selected by the Railroad Company October 17, 1883. The selection list specified losses in bulk, *i. e.,* it stated the losses by specific descriptions and the selections by specific descriptions, each footing up the same number of acres, but did not assign each selection to a particular loss. At the time the list was filed it conformed in this respect to the rule of the department. The list was received by the Register and Receiver and transmitted to the general land office. April 11, 1893, the Railroad Company, acting under direction of the Secretary of the Interior, rearranged the selection list so as to specify a praticular tract lost as the basis for each selection. In the rearranged list there was set opposite the tract in controversy in the Hoyt case the NW¼ of NE¼ of section 11, township 46 north, range 16 west, in Minnesota. The last described land was the land lost furnishing the basis of the selection and it was within the *place* limits of the Northern Pacific grant, but also in the *indemnity* limits of the grant to the State of Minnesota for the Lake Superior and Mississippi Company (act of May 5, 1864), and under the act last mentioned had been selected by and was approved for patent to the state March 26, 1868.

The record is quite voluminous but most of the material facts are set forth in the opinion of the Secretary of the Interior deciding *Jones v. Northern Pacific* (the identical case of Hoyt now here). This


40 Mile Limit N.P.R.R.
30 Mile Limit N.P.R.R.
20 Mile Limit N.P.R.R.
May 7. 1864
Map of General Route Filed
20 Mile Limit Definite Location L.S.& M.R.R.
30 Mile Limit Definite Location L.S.& M.R.R.
NORTHERN PACIFIC RAILR
10 Mile Limit Definite Location L.S. & M.R.R.
L.S. & M. R.R.
Outside Limit of L.S. & M.R.R. as shown on Map of Genl Rte Filed May 7/64
Location L.S. & M.R.R.
Hoyt Bo
Outside Limit of L.S. & M.R.R. as shown on Map of Genl Rte Filed
10 Mile Limit Definite
Def. Loc. L.S. & M.R.R.
MINNESOTA
WISCONSIN
20 Mile Limit


Hoyt Claim
Campbell Claim
Lake Superior
RAILROAD
Hoyt Base
Eastern Terminal
(as erroneously fixed by Secretary)
To Ashland
20 Mile Limit N.P.R.R.
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40 Mile Limit N.P.R.R.
MINNESOTA
WISCONSIN

Carlton
Carlton
Terminal
Superior
MINNESOTA
WISCONSIN

Superior
HERN PACIFIC RAILROAD
Ashland
Ashland Terminal
Terminal

opinion is set forth as an exhibit to Hoyt's complaint. (Transcript pp. 33-41.)

The Hoyt and Campbell cases could not have arisen but for the mistake of law of the land department of the United States in holding that the eastern terminus of the Northern Pacific grant was at Duluth, instead of at Ashland as asserted by the Railroad Company. This mistake was corrected and the eastern terminus decided to be at Ashland in *Doherty v. Northern Pacific Railway Company*, 177 U. S. 421, and *United States v. Northern Pacific Railroad Company*, id. 435. The lands involved in both the Hoyt and Campbell cases lie in Minnesota but opposite to that part of the Northern Pacific road east of Duluth. See maps opposite.

Pursuant to the Secretary's decision of August 27, 1896 (23 L. D. 204) holding that the grant terminated at Duluth the Hoyt and Campbell selections, March 22, 1897 had been ordered cancelled; but the order directing cancellation was put expressly on the erroneous ground that the lands were east of Duluth. After the decisions of this court above cited the selections were reinstated. After the order directing cancellation and before the selections were reinstated, to-wit, on December 17, 1897, Richard B. Jones filed his application as below stated and made his final proof on the 10th of December, 1898. But before the date last named the land was withdrawn from all entry by virtue of the departmental order of February 28, 1898 (26 L. D. 265) which order was made to preserve the selections and the existing status of all entries until this court should decide the then pending cases above referred to (Transcript pp. 33, 34).

Before this court corrected the Secretary's error as to the eastern terminus, Richard B. Jones made an application to enter the land involved in the Hoyt case under the act of Congress approved June 3, 1878, as amended by act of August 4, 1892, commonly known as the "timber and stone law." December 10, 1898, Jones filed his proofs and paid to the Receiver one hundred dollars, being the purchase price of the land, and thereupon received a receiver's receipt, across the face of which was written: "Subject to any claim the Northern Pacific Railroad Company may have to the land herein described." The Railroad Company's selection had then been fifteen years of record in the land office against this land, of which fact Jones, when he offered his proofs and money, had emphatic notice. He also was then notified that the land was withdrawn awaiting the result of litigation (Transcript pp. 13, 14, 15, 33, 34). By special warranty deed dated December 19, 1908, Jones conveyed to Minnie Stewart; and on March 22, 1902, Minnie Stewart conveyed to the complainant Hoyt.

The decisions of this court holding the eastern terminus to be at Ashland were announced in April, 1900. On the 2nd of December, 1901, the Commissioner of the General Land Office, on appeal from the action of the local land officers allowing the Jones entry, directed a cancellation of that entry because of the prior selection of the Railway Company. On appeal the Commissioner's decision was affirmed by the Secretary of the Interior August 30, 1905. The Secretary then approved the Railroad Company's selections of the lands involved in the Hoyt and Campbell cases, and on October 18, 1905, patent for these lands issued

to the Northern Pacific Railway Company (Transcript pp. 9, 103), which company conveyed by warranty deed to Weyerhaeuser and Humbird.

The case of Campbell is in all of its facts like the case of Hoyt—except that in the Hoyt case the plaintiff's assignor paid his money to the Receiver of the Land Office, taking a receipt in terms subject to the Railway Company's rights, whilst Campbell's application to enter, made October 26, 1895 (Transcript Campbell Case p. 4), was rejected by the land officers and his case stands upon that rejection, he never having tendered his proofs or payment for the land or done anything farther but to allege in his bill a quite uncertain and indefinite willingness and readiness to pay (Transcript Campbell Case pp. 5-9, 18, 19). The Campbell case differs from the Hoyt case in one other respect, namely, that the lost land furnishing the selection basis lies farther west in Minnesota and is not, like the land in the Hoyt case, within indemnity limits of the Lake Superior and Mississippi grant.

The land involved in the Wass case is within the indemnity limits of the grants to the Territory of Minnesota made in the acts of Congress above referred to. The State of Minnesota conferred the benefit of these grants on the Western Railway Company of Minnesota by legislative act of March 1, 1877. This company filed a selection against the land in suit on the 31st day of December, 1877, and on the 4th of December, 1889, the St. Paul and Northern Pacific Railway Company (successor in interest to the Western Railway Company) filed in the land office an amended selection list assigning for each selection a particular and described loss. The matter appears to have stood

without action in the land department until ten years later when, in the month of April, 1899, Fred Wass entered upon the land with the intention of making it a homestead and has ever since been in possession. On the 4th of December, 1899, Wass presented to the land office an application to enter under the homestead laws. The Register and Receiver filed his application, but on the same day rejected it and refused to receive the fees tendered, basing such refusal and rejection upon the ground that the lands filed for were embraced in the then pending though unapproved selection of the St. Paul & Northern Pacific Railway Company. Wass appealed and the action of the local land office was affirmed by the Commissioner of the General Land Office and by the Secretary of the Interior respectively. Thereupon the Secretary of the Interior on February 16, 1905, approved the selection of the Railroad Company and on March 15, 1905, issued patent to the State of Minnesota, the state issuing its patent in turn to the Wesern Railway Company of Minnesota. All rights under the patent have become vested in the Northern Pacific Railway Company the plaintiff in error. The selection right under the grant to the Territory of March 3, 1857, appears to be identical with that under the Northern Pacific act of July 2, 1864, section 1 of the 1857 act (11 Statutes at Large 195) giving the right of selection "Subject to the approval of the Secretary of the Interior." The facts in the Wass case are set forth in the answer of Wass (Transcript in No. 181, pp. 6-10).

Hoyt and Campbell seek in their bills to cast a doubt upon the right of the Northern Pacific Railway Company, which is a Wisconsin corporation, to claim as

successor in title to the Northern Pacific Railroad Company, the federal corporation, alleging that under the acts of Congress the Rail*road* Company had no power to execute more than one mortgage, and alleging (or leaving it to be inferred) that the Railway Company's title came through foreclosure of a *second* mortgage made by the Rail*road* Company. But the answer and proofs show that the land grant lands, including those in suit, of the Northern Pacific Railroad Company lying in Minnesota were never covered by *any* mortgage executed by the Rail*road* Company but on the contrary were purchased by the Railway Company under decrees of the United States Court for the District of Minnesota in a general creditor's suit.

The same plaintiffs set up certain legislation in Wisconsin creating the Superior & St. Croix Railway Company, and allege that the Northern Pacific Railway Company is *successor* of the Superior & St. Croix; and that under the Wisconsin legislation the Northern Pacific Railway Company has no right to take or hold any lands not necessary for the operation of its railroad. But the bills and answers make it plain that the Northern Pacific Railway Company is the Superior & St. Croix Company, and not its successor, the change being one of name. The act of Wisconsin of 1895, sec. 7, clearly gives the company the power to purchase the land in suit.

QUESTIONS IN THE CASE.

Proper errors are assigned in each case to cover the questions below stated.

A question common to all the cases and one which we think is decisive is: Whether, a floating right be-

ing granted by Congress to select land subject to the approval of the Secretary, being fastened to a particular parcel by entry on the land books, by filing proof of right with the Secretary, and by doing everything that the law requires, such selection will absolutely be annulled by an application for the same parcel under a law for disposal of the public domain, filed while the Secretary is examining and considering the selection right. We assert that in such cases a rule of clear justice, well settled in the decisions of this court, applies, which is, that the selection is preserved until passed upon by the Secretary, who has jurisdiction to approve it, and that when approved the selection is effective from its inception to cut out applications filed subsequently.

The suit of Hoyt was decided by the Circuit Court of Appeals in his favor, on the ground that the Secretary of the Interior's approval of the Railway Company's selection and the patent to the Railway Company were without authority and void; that the Secretary had no discretion or right to approve this selection, it not having been acted upon when Hoyt's grantor applied to purchase, but was by such application to purchase deprived of all jurisdiction and right to consider the selection and absolutely bound by law to grant the application to purchase; that for this reason the appellants hold their title under the patent as trustee for Hoyt and should be decreed to convey to him.

The Circuit Court of Appeals decided the Campbell case the other way, distinguishing it from the Hoyt case, in that the Receiver of the land office refused to accept Campbell's application and proofs, whilst he did receive the application and proofs and took the

money of Hoyt's grantor (though at the same time advising him of the Railway Company's claim on file and giving him a receipt for his money across the fact of which was written "Subject to any claim the Northern Pacific Railroad Company may have to the lands herein described"). That Hoyt's grantor actually paid his money to the Receiver of the land office and filed his proofs, in the opinion of the Circuit Court of Appeals, segregated the land from the public domain, so that the Secretary could not after that approve the selection; whilst Campbell's money and proofs the land officers refused to receive, thus leaving the land free of any claim of record; and being so free of claims of record the Circuit Court of Appeals held left the selection under the Secretary's jurisdiction.

In the Wass case the application was not to make a cash purchase but to obtain the land as a homestead. The land officers wholly rejected the application and refused to accept the fees required by law and refused to enter application of record in the land office.

The controlling proposition held by the court below in the Hoyt case is, that notwithstanding the grantee under an act of Congress has suffered a loss and has done everything possible to make selection of indemnity therefor according to law, such selection is ineffective without approval by the Secretary of the Interior: and *that the Secretary cannot legally grant that approval after an application for the land under any public land law, notwithstanding the selection was the first entry, either attempted, or of record in the land office, and notwithstanding the land was free public land subject to the selection at the time of its filing.* In the Campbell and Wass cases the local land

office had refused *in toto*, in the Campbell case the application to purchase, and in the Wass case the application to homestead. The Hoyt case differs only in the fact that the local land officers erroneously took the applicant's money and filed his entry advising him distinctly that this was subject to the Railroad Company's rights. The Circuit Court of Appeals on this difference in facts decided the Hoyt case against the Railway Company's grantees and the Campbell case for them, whilst the Supreme Court of Minnesota in the Wass case reluctantly followed the Circuit Court of Appeals in the Hoyt case, in effect overruling its own previous decisions in *McHenry v. Nygaard*, 72 Minn. 2, and *Sage v. Swenson*, 64 Minn. 517, though the facts in the Wass case seem like those of the Campbell rather than the Hoyt case.

Opposing counsel in the Hoyt and Campbell cases assert however other propositions (mostly immaterial to the Wass case) which must be noticed. He says:

1. That the Northern Pacific *Railway* Company, as distinguished from the Northern Pacific *Railroad* Company, could take no title, because (a) it did not succeed to the rights of the *Railroad* Company touching the land in suit, (b) the act of Wisconsin of 1895, constituting the charter of the *Railway* Company, section 7 of which confers the right to buy the Northern Pacific grant, is unconstitutional, as being special legislation.

2. That the loss which was the basis of the selection in the Hoyt suit was not a good loss, because not within the Northern Pacific place or granted lands, by force of the provisio in section 3 of the Northern Pacific grant reading: "*Provided*, that if said route

shall be found upon the line of any other railroad route, to aid in the construction of which lands have been heretofore granted by the United States, as far as the routes are upon the same general line the amount of land heretofore granted shall be deducted from the amount granted by this act." The assertion is, that the Lake Superior and Mississippi grant and the Northern Pacific grant were upon the same general line, and that by reason of the language quoted the lands falling within the grant to the Lake Superior and Mississippi Company were to be deducted from that to the Northern Pacific.

3. That should the last assertion be unsound counsel still contends that the lost lands furnishing the basis of selection in the Hoyt case, even if within the Northern Pacific granted limits, being appropriated to an earlier grant, namely, one of May 5, 1864, may furnish a good basis, for *first* but not for *second* indemnity selections under the Northern Pacific grant; having been, it is asserted, lost to that grant *before* its passage.

4. That the Railroad Company's selections of the lands in suit were irregular, informal, or invalid, because (a) made originally without the assignment to each particular selection of some specific and described loss, and (b) that the loss and the lands selected in lieu thereof were upon different sides of the track (which is true in the Hoyt and Campbell cases).

5. That the land involved in the Hoyt suit falls within the provisions of the sundry civil bill of July 1, 1898, and should under that bill have been awarded by the Secretary of the Interior to the claimant adverse to the Railway Company.

ARGUMENT.

1. We shall attempt first to show, that the Circuit Court of Appeals erred in holding in the Hoyt case the Secretary's approval of our selection to be beyond his jurisdiction and void.

This conclusion is reached only by saying (as the Circuit Court of Appeals did say) that the entry at the land office of Hoyt's grantor Jones made Jones "from the moment of that purchase" "the owner of the entire beneficial interest in and equitable title to it" leaving in the United States "the naked legal title which it held in trust for him."

But we submit this is begging the whole question, which is whether the entry of Jones did make him the equitable owner. If it did there is an end of the case. But the very question is whether Jones got any rights, and if so what rights, by his entry subject to the selection. To determine this question we cannot start with his entry, but must look at the events touching this title in the order of time.

And in the order of time we find first that the Northern Pacific, having suffered a loss (as we shall try to show later) entitling it to select indemnity, found this piece of vacant public land, against which there were no claims or rights, of record in the land office or otherwise; and on the 17th day of October, 1883, it entered a selection of that land at the land office. If followed up the selection and some years later altered its form to comply with new regulations of the department.

A selection filed and recorded as this was, against this land in the land office, the land department has uniformly regarded as an *entry* and as having the same

effect to segregate the land from the general bulk of public lands that any other entry has. *Porter v. Landrum*, 31 L. D. 352; *Southern Pacific Railroad Co.*, 32 L. D. 51; *Santa Fe Pacific Railroad Co.*, 33 L. D. 161; *Eaton, et al., v. Northern Pacific Railway Co.*, 33 L. D. 426; *Santa Fe Pacific Railroad Co. v. Northern Pacific Railway Co.*, 37 L. D. 669. The well settled rule is stated as follows by the then Assistant Attorney General (Mr. Justice Van Devanter) in *Southern Pacific Railroad Company*, 32 L. D. 51:

> "Under this legislation the company was, by the direction or regulations of the Secretary of the Interior, required to present at the local land office selections of indemnity lands, and these selections, when presented conformably to such direction or regulations, were to be entertained and noted or recognized on the records of the local office. When this was done the selections became lawful filings; and while, until approved and patented, they would remain subject to examination, and to rejection or cancellation where found for any reason to be unauthorized, they, like all other filings, were entitled to recognition and protection so long as they remained undisturbed upon the records.
>
> There is no question in this case as to the sufficiency of the loss assigned, or as to the formality and regularity of the selection.
>
> What effect has been given to a pending railroad indemnity selection?
>
> Prior to 1887 the rights of a railroad company within the indemnity belt of its grant were protected by executive withdrawal, but on August 15, that year, these withdrawals were revoked, and the land restored to settlement and entry; but such orders, although silent upon the subject, were held not to restore lands embraced in pending selections. (*Dinwiddie v. Florida Railway*

> *& Navigation Co.*, 9 L. D. 74). In the circular of September 6, 1887 (6 L. D. 131), issued immediately after the general revocation of indemnity withdrawals, it was provided that any application thereafter presented for lands embraced in a pending railroad indemnity selection, and not accompanied by a sufficient showing that the land was for some cause not subject to the selection, was not to be accepted, but was to be held subject to the claim of the company under such selection. In fact, a railroad indeminty selection, presented in accordance with departmental regulations and accepted or recognized by the local officers, has been uniformly recognized by the land department as having the same segregative effect as a homestead or other entry made under the general land laws."

This is not saying that the selection before approval by the Secretary confers the least right or title, and is therefore entirely consistent with *Humbird v. Avery*, 195 U. S. 480. But that the selection duly recorded at the land office is an entry, which may ripen into title if afterwards approved by the Secretary, is a proposition, not only uniformly held by the land department, but well established by decisions of this court.

In *Oregon & California Railroad Company v. United States*, 189 U. S. 103, Mr. Justice Harlan delivering the opinion ruled upon the precise point, saying (p. 112):

> "Now, it has long been settled that while a railroad company, after its definite location, acquires an interest in the odd-numbered sections within its place or granted limits—which interest relates back to the date of the granting act—the rule is otherwise as to lands within indemnity limits. As to lands of the latter class, the company

> acquires no interest in any specific sections until a selection is made with the approval of the Land Department; and then its right relates to the date of the selection."

In *Shepley v. Cowan*, 91 U. S. 330, the court considered a conflict between a pre-emption claim and a selection on behalf of the State of Missouri under an act of Congress conveying to the state five hundred thousand acres of land *to be selected* by the Governor, the act providing that if the selection should be approved by the Secretary patents were to issue. The court (p. 337) said touching conflicts between such right of selection and a pre-emption:

> "The party who takes the initiatory step in such cases, if followed up to patent, is deemed to have acquired the better right as against others to the premises. The patent which is afterwards issued relates back to the date of the initiatory act, and cuts off all intervening claimants. Thus the patent upon a State selection takes effect as of the time when the selection is made and reported to the land office; and the patent upon a pre-emption settlement takes effect from the time of the settlement as disclosed in the declaratory statement or proofs of the settler to the register of the local land-office."

On page 338, after distinguishing *Frisbie v. Whitney*, 9 Wall. 187, and *Yosemite Valley Case*, 15 id. 77, the Court said:

> "But whilst, according to these decisions, no vested right as *against the United States* is acquired until all the prerequisites for the acquisition of the title have been complied with, parties may, as against each other, acquire a right to be

> preferred in the purchase or other acquisition of the land, when the United States have determined to sell or donate the property. In all such cases, the first in time in the commencement of proceedings for the acquisition of the title, when the same are regularly followed up, is deemed to be the first in right."

The exact proposition was the basis of decision in *McCreery v. Haskill*, 119 U. S. 327. In that case the State of California had the right to select lands, the act requiring the selection before becoming effective to be approved by the Secretary of the Interior. The case involved a conflict between a selection by the state made April 22, 1868, and afterwards approved by the Secretary, and a settlement claim instituted one year and eight months after the selection but before the Secretary's approval. The court held that the land was open to both claims, to selection on behalf of the state and to settlement and pre-emption by settlers, but that a selection approved by the Secretary at a later day related back to its filing and cut out the claim under the settlement laws.

The case of *Osborn v. Froyseth*, 216 U. S. 571 [March 14, 1910], decides the question inferentially. In that case the railroad company had attempted a selection in 1883 which was rejected by the Secretary because not made in accordance with the rules of the department. In May, 1888, Froyseth settled upon the land intending to claim it as a homestead and ever since had continued in possession, residing thereon with his family. November 3, 1891, he made entry which was rejected for an invalid reason. October 29, 1891, the railroad company made a second selection and the first

controversy was between this selection and the homestead right of Froyseth initiated prior thereto. This was decided in favor of the homestead settlement on the ground that it was prior to the selection. It also was urged on the court that the railroad company had rights under the selection of 1883 and inferentially the opinion concedes that, if the 1883 selection was valid, rights under it would be carried back to that date, and disposed of the contention by holding that the 1883 selection was void. The point of decision is thus stated in the opinion, page 576:

> "The plain effect of the settlement made upon the land here in controversy before any valid selection of the same land by the railroad company, under its grant, was to initiate a homestead right. That settlement and possession continued from the time it was first made, and when, in October, 1891, the Hastings and Dakota Railroad, or its successors in title, attempted to select that land as indemnity land, the land in question was in the actual occupancy of Froyseth claiming it as a homestead."

The precise question here was decided in this court at a much earlier date. We refer to *Campbell v. Doe*, 13 Howard 244. That case came up from the Supreme Court of Ohio, where it was reported in 17 Ohio 267, and the controversy before coming into court had been waged before the Secretary of the Treasury, Roger Brooke Taney (whose powers then included control of public lands). The case involved an act of Congress passed on the 20th of May, 1826, which authorized selection by the Secretary of the Treasury of certain lands for school pur-

poses. The board of county commissioners of the County of Lawrence filed in the local land office in Ohio a request that the Secretary of the Treasury select certain lands for school purposes under this law. The Register transmitted the selection to the Commissioner of the General Land Office. Afterwards Robert Hamilton applied at the local land office in Ohio to enter the land and was informed of the selection and that on that account the land was withheld from sale. Thereupon Hamilton with the assent of the Register of the Land Office entered and paid for the quarter section and took a final receipt. The Secretary of the Treasury afterwards approved the request of the Commissioners of Lawrence County and selected the land for school purposes under the act of Congress. The case was submitted to the court upon an agreed statement of facts and under stipulation that should the court be of opinion that the entry by Hamilton was valid, notwithstanding the then pending unapproved selection, judgment should be entered for the defendants, otherwise for the plaintiff.

In this court Mr. Vinton, in support of the selection, argued:

> "The title thus vested in the State * * * reaches back to the date of the original selection of the land for schools, and the report of it, as such, to the Commissioner of the General Land Office. * * * The selection of the land * * * and the report of it, by the Register, to the General Land Office, by direction of the Secretary, for his decision thereon, being necessary and proper preliminary steps toward carrying the act into execution, had the effect in law to sever the lands thus selected and reported from the mass of the public lands until his decision was had; and, when ap-

> proved by him, the whole proceeding was in law one act, and constituted the selection by the Secretary required by the act."

The court said it was clear that the Secretary of the Treasury had power under the act of Congress to make the selection, notwithstanding the intervening entry of Hamilton, and affirmed the judgment of the Supreme Court of Ohio which had been in favor of the selection.

According to the foregoing decisions a selection duly filed and entered in the land office is not a nullity, and has the effect either: (a) to segregate the land and prevent other entries, (as would seem to be held in the Land Department decisions cited) or, (b) to attach to the land a claim which, by subsequent approval, may ripen into title as against a later claim, on the principle "prior in time first in right" (if the filing of later claims is permissible, which seems to be the view held in the decisions of this court cited). It is not necessary to press our argument farther than to affirm that, while the filing of a selection will not prevent the Secretary from receiving other applications and entries, still approval will give a good title as of date of the selection.

It is not necessary for us to maintain that a selection has a segregative effect to separate from the public domain, so as to prevent the filing of other applications. Land under unapproved selection may still be open to other entries *(Sjoli v. Dreschel* and cases cited above) but as to such conflicting applications this court repeatedly has applied the rule "prior in time first in right."

Consider the question on principle. A selection right "subject to the approval of the Secretary" to make good a specific grant of lands by Congress certainly is equal in validity and dignity to a general right of a class to select under a general land law. A right to enter or purchase public lands, under the homestead law or under the timber and stone law, is only a right to select. Lands are not reserved or appropriated by public land laws. Nor have applicants under those laws any contractual or vested right as against the government. By such laws Congress has given individuals of certain classes a right only to select, which is exactly what Congress also has given under laws making specific grants. All such rights, whether under general law or special law are of the same nature and are alike rights to select subject to approval of the Secretary. The Secretary in either case must pass on the same questions, that is (a) whether the applicant has shown himself entitled to select (b) whether the land chosen is free from appropriation and from prior claims (c) whether the proofs and proceedings are according to law and rules of the department. If these two rights are of the same nature and equal otherwise, it follows that the one prior in time will prevail. And so the land department and this court always has determined them.

When Jones, the grantor of Hoyt, went to the land office December 17, 1897 he found the selection entry of the railroad company there of record and ordered canceled only because it was east of Duluth. It had been so of record for over fifteen years unacted upon by the Secretary. Such delays are not uncommon. The duties of the Secretary are judicial. He must

determine in the first place whether there are deficiences in the grant giving the right to select, and in the second place whether the particular lands selected can properly be taken for those deficiencies, *Wisconsin Central Railroad Co. v. Price County*, 133 U. S. 496, 511. When Jones offered his proofs and money in December, 1898, the land was withdrawn to await the court's decision and he was most distinctly advised of the inception of a right in the railroad company, which might ripen into title by the Secretary's approval, and he chose with open eyes to buy into that contest. He is entitled to no equitable consideration and should stand on his legal right. *Campbell v. Doe, supra.* To Hoyt, Campbell and Wass the language clearly applies which was used by the court in *Gertgens v. O'Connor*, 191 U. S. 237, 246:

> "It is well to look further into his equities. It will be borne in mind that he did not go upon the land until April, 1891. The tract was within the indemnity limits of the company's grant, and was, therefore, subject to selection. It had been withdrawn from entry under the land laws, and that fact appeared on the records of the local land office. It had, in fact, been selected by the company, and that selection had not been cancelled. Ireland's contract of 1883 was of record in the office of the register of deeds of the county, and shown on the books of the company. The defendant applied for leave to enter the lands as a homestead, and was denied such leave by the local land officers on the ground that it was within the twenty-mile indemnity limits of the railway company's grant, and had been selected by the company. He was charged with knowledge of the act of Congress giving a preferential right of purchase from the government in case the company's title should

> in any way fail. Notwithstanding all this, he remained upon the land and put his improvements on it, and now claims to be entitled to the rights of a *bona fide settler*. He does not come within the letter of the statute, nor does he come within the reach of any reasonable equities. He evidently took his chances on the possibility of the company's failing to obtain title and a subsequent failure of Ireland to insist upon his preferential right of purchase. He went upon the land with full knowledge of all the facts, which showed that he had no right to enter, speculating upon possibilities which have not been realized, and having so speculated he cannot complain if he suffer the consequences which often attend the failure of a speculation."

To say, that by his application and payment under the circumstances, Jones acquired "*entire beneficial interest and equitable title*" and reduced the title of the United States to a "*naked legal title*," is not only to beg the question, but to contradict the well settled authorities in the land department and the decisions of this Court above cited.

Jones and his grantees cannot complain of the doctrine of relation being applied to them, and only by so applying it can justice be done. Certainly the right to select indemnity is clearly provided in the land grants and was intended to be a valuable right. Owing to the enormous areas comprised within those grants and the limited force in the department of the interior, it is customary that many years elapse before a selection can even be considered. The grantee entitled to select of necessity files in the land department a selection claim specifying particular land. That selection, like any other entry in the land department,

becomes a matter of record against that land. When the Secretary reaches consideration of the selection and approves it, equity, legal analogies, and the rules applied to all other entries at the land office require, that the approval and patent should be held to reach back to the inception of the claim. This doctrine is applied to all entries under the public land laws, and necessarily so, because time must elapse before they can be consummated, and in order to preserve the right in the interim approval and patent must relate back to the filing of the claim in the land office; or to put the matter in another way, what the Secretary was called upon to decide and what he did decide was that the selection was valid *when filed*.

The doctrine of relation has been defined as follows:

> "Where there are divers acts concurrent to make a conveyance, estate or other thing, the original act shall be preferred; and to this the other acts shall have relation." *DeForest v. Ramsey*, 3 Cow. 75, 80.
>
> "There is no rule better founded in law, reason, and convenience than this, that all the several parts and ceremonies necessary to complete a conveyance shall be taken together as one act, and operate from the substantial part by relation." *Landes v. Brant*, 10 How. 348, 373.
>
> "By the doctrine of relation is meant that principle by which an act done at one time is considered by a fiction of law to have been done at some antecedent period. It is usually applied where several proceedings are essential to complete a particular transaction, such as a conveyance or deed. The last proceeding which consummates the conveyance is held for certain purposes to take effect by relation as of the day when the first

proceeding was had. Thus, in the present case, the patent, which was issued in 1862, is said to take effect by relation at the time when the survey and plat of the location, made in 1818, were returned to the recorder of land titles under the act of Congress. At that time the title of the claimant to the land desired by him had its inception, and so far as it is necessary to protect his rights to the land, and the rights of parties deriving their interests from him, the patent is held to take effect by relation as of that date."

Gibson v. Chouteau, 13 Wall. 92, 100.

See, also,

United States v. Anderson, 194 U. S. 394;
Musser v. McRea, 44 Minn. 343.

In the recent case of *United States v. Detroit Lumber Co.*, 200 U. S. 321, 334, the court said:

"If it be contended that, by virtue of the contracts for the sale of timber, it had acquired some interest in the lands prior to the issue of patents, it is sufficient to say that by the doctrine of relation the patents, when issued, became operative as of the dates of the entries. It is true that this doctrine is but a fiction of law, but it is a fiction resorted to whenever justice requires. It is that principle by which an act done at one time is considered to have been done at some antecedent time. It is a doctrine of frequent application, designed to promote justice. Thus, a sheriff's deed takes effect not of its date, but of the time when the lien of the judgment attached. The ordinary railroad land grants have been grants *in praesenti*, and under them the title has been adjudged to pass, not at the completion of the road, but at the date of the grant. *Leavenworth, Lawrence & Galveston Railroad v. United States*,

92 U. S. 733; *St. Paul, etc., Railway Co. v. Phelps*, 137 U. S. 528; *St. Paul & Pacific v. Northern Pacific*, 139 U. S. 1; *United States v. Southern Pacific Railroad*, 146 U. S. 570. A patent from the United States operates to transfer the title, not merely from the date of the patent, but from the inception of the equitable right upon which it is based. *Shepley v. Cowan*, 91 U. S. 330. Indeed, this is generally true in case of the merging of an equitable right into a legal title. Although the patents in this case were not issued until after the sales of the timber, yet when issued they became operative as of the date of the original entries. This doctrine has frequently been recognized by this and other courts. *Landes v. Brant*, 10 How. 348; *Lessee of French and Wife v. Spencer*, 21 How. 228; *Stark v. Starrs*, 6 Wall. 402; *Lynch v. Bernal*, 9 Wall. 315; *Gibson v. Chouteau*, 13 Wall. 92; *Simmons v. Wagner*, 101 U. S. 260; *Jackson v. Ramsey*, 3 Cow. 75; *Welch v. Dutton*, 70 Ill. 465; *Ormiston, Guardian, v. Trumbo, Admr.*, 77 Mo. App. 310. In the first of these cases it was said (p. 372):

'To protect purchasers, the rule applies, "that where there are diverse acts concurrent to make a conveyance, estate, or other thing, the original act shall be preferred; and to this the other acts shall have relation," as stated in Viner's Abr. tit. Relation, 290. * * *

'Cruise on Real Property, vol. V., pp. 510, 511, lays down the doctrine with great distinctness. He says: "There is no rule better founded in law, reason and convenience than this, that all the several parts and ceremonies necessary to complete a conveyance shall be taken together as one act, and operate from the substantial part by relation."'"

Should it be said that relation cannot cut out the rights of third persons, that again would be begging the question, for the very inquiry at issue is what rights

can be acquired by intervening applicants. Relation is never applied except to cut out intervening alleged rights. The assertion of such rights is necessary before the rule can come into play. It is a general principle that relation is enforced for the furtherance of justice, but is not applied to defeat intervening rights or equities of innocent third persons. But Jones and his grantees are not innocent third persons or purchasers in good faith without notice. Certainly one who applies to enter public lands, against which there is already a filing of record of which he is advised, is not a purchaser without notice. Jones had emphatic notice, but elected to enter a contest: there is no equitable reason why the principle of the decisions before cited, "prior in time first in right," should not apply to his case.

The whole contention to the contrary is based upon the language used in the opinion in *Sjoli v. Dreschel*, 199 U. S. 564. Having in mind the danger of applying general language to facts not involved in the case before the court, which Chief Justice Marshall, in *Cohens v. Virginia*, 6 Wheat. 264, 399, warned against, it is most important to note carefully the facts in the Sjoli case. These were, that Sjoli being a qualified homesteader settled upon the land in 1884 with the intention to make it a homestead. He grubbed and broke part of it, built a house and stable thereon and moved into the house with his family in October, 1884. He had lived with his family upon the premises continually ever since, had broken twenty-two acres and had constructed fences and other improvements of the value of five hundred dollars. He was in occupation of the land, claiming it as a homestead *before*

the railway company filed its selection. In 1889 he applied for patent and followed up his application so that in June, 1901, his entry *was approved and patent issued to him.* The other party to the suit, Dreschel, had no title except such as was conferred by a *selection disapproved by the Secretary.* In that case therefore the homesteader was first in time, and the Secretary had disapproved the subsequent selection on the very principles for which we contend. The approval of his application related back to his settlement to cut out the railroad selection. In this case on the contrary the selection was filed when the land was vacant and unappropriated, many years before the attempt to place of record a hostile claim and the entry was *subject* to the selection. Moreover, the Secretary approved the selection and issued the patent to the selector. There is nothing in *Sjoli v. Dreschel* holding that the Secretary *must* disapprove a selection merely because of a later entry, because the court takes pains to point out that the selection *had been disapproved* in the Sjoli case, and repeatedly alludes to the fact that Sjoli's settlement *was prior in time.*

Mr. Justice Harlan says, on page 566, that until selections are approved by the Secretary lands embraced in the selection lists are subject to be disposed of by the United States, or to be settled upon and occupied under the pre-emption and homestead laws. This was a sufficiently accurate statement as applied to the facts of that case; but we submit, that the language could not have been intended to go entirely outside of those facts, to determine cases whose facts are essentially different and to overrule the settled decisions of this court and of the land department. It

is admitted, that until the selection is approved by the Secretary, land subject thereto is in the control and jurisdiction of the department, and that the selection confers no title upon the selector. This was held in *Humbird v. Avery*, 195 U. S. 480. It is admitted that land under an unapproved selection is subject to be disposed of by the United States. This is the result of many decisions. And the further statement that such land may be entered under the pre-emption and homestead laws may be admitted to its fullest extent so far as these cases are concerned.

But the question is, what is meant by saying that such land is subject to entry under the pre-emption and homestead laws? Simply we submit what was held in *Oregon & California Railroad Company v. United States, Shepley v. Cowan, McCreery v. Haskill, Campbell v. Doe*, before cited, namely, that entries may be filed which operate to create a contest and also to take the land providing the selection is *disapproved*. *La Bar v. Northern Pacific R. R. Co.*, 17 L. D. 406, was such a case. But there is no ruling in the Sjoli case that a selection is not the inception of a claim, or that it does not rank, if otherwise valid, ahead of subsequent entries, or that if approved the patent issued on it does not relate back according to the usual rule. We contend that it was never intended in the Sjoli case to decide more than, that subsequent filings might be made to be passed on by the Secretary in connection with the selection. This interpretation of the language brings the case into complete harmony with previous decisions of the court, and the construction contended for by opposing counsel makes the decision conflict with what was before decided. Mr.

Justice Moody, when attorney general, in opinion of June 19, 1906, placed the precise construction on this opinion which we contend for, and the Land Department has followed this opinion. Opinions of Attorneys General, vol. 25, p. 632.

Our contention is made more evident when we consider the statement of Mr. Justice Harlan in the opinion, that the propositions laid down in the Sjoli case are laid down in numerous decisions of the court (n. p. 566). For, whilst these decisions support our interpretation of the language of the court, not one of them supports the contrary interpretation. Several of them are cases where the whole ruling was that the Secretary had no right to make general withdrawals for indemnity under the Northern Pacific grant. That proposition is conceded for it has been decided several times. But there is no analogy between a general withdrawal of *unselected* lands to save indemnity for *possible* selections, and a retention by the Secretary of jurisdiction over distinct parcels *actually* selected to the extent necessary to pass on the selections. One is a case of withdrawing from settlement a whole region for protection of possible future selections, the other preserving specific parcels to satisfy present rights, actually asserted and attached.

To infer from the language of the opinion in the Sjoli case the proposition that an application to purchase under the land laws *ipso facto* annuls a prior selection and withdraws it from the consideration of the Secretary is contrary to the decision written by Mr. Justice Harlan in *Humbird v. Avery*, 195 U. S. 480. In that case it appeared that the railway company had filed certain selection lists (which included the

very selections here involved in the Hoyt and Campbell cases) and that entries under both the homestead and other laws had afterwards been made; that the land department had not acted upon either the selections or the entries. The suit was brought relying upon the unapproved selections, an important item of relief prayed being the restraint of threatened trespass by cutting timber. The Assistant Attorney General was allowed to intervene in the case, and pressed upon the court the proposition that lands in this status were still under the jurisdiction of the land department; that *it must act upon the selections and determine their regularity and validity before the matters complained of could be carried into court for adjudication.* This court sustained the argument and in substance sent the case to the department for it to decide as between the selections and the entries. It was not suggested by any counsel that the mere filing of an entry voided a prior selection, and had that been the view of the court the decision must have been that the railway company had no equity or standing before the department and the department no jurisdiction, except to pass upon the entries disregarding the selections.

If we are right in contending that the Secretary had jurisdiction to approve the selections, all three cases under discussion are thereby disposed of, in so far as concerns the questions on which they were decided below. The Campbell case was decided in our favor by the Circuit Court of Appeals on the ground of differences between that case and the Hoyt case—mainly upon the ground that Campbell had no entry in the land office whilst Hoyt's grantor had. The question whether the Campbell case was rightly decid-

ed below (assuming that the Hoyt case was also rightly decided) we submit upon the opinion of the Circuit Court of Appeals and upon the argument by counsel associated with us in the Campbell case. However, if the decision of the Campbell case below is sound, it ought, we submit, to control the Wass case, because Wass like Campbell never had an entry in the land office which could segregate the land from the public domain and thus avoid the selection; and Wass like Campbell was distinctly advised of the selection and elected to engage in a contest.

This leaves certain other questions raised by counsel in the Hoyt and Campbell suits to be considered.

2. It sufficiently disposes of all objections to the right of the Northern Pacific *Railway* Company as distinguished from the Northern Pacific *Railroad* Company, to say that Hoyt and Campbell cannot raise the question. If the Railway Company is not the successor of the Railroad Company the result is that the *Railroad* instead of the *Railway* Company is entitled to the land. Whilst this might give the Railroad Company the right to recover the title, it does not help either of these plaintiffs. They sue to charge the defendants as trustees of the legal title for *them*—and in the Campbell case it is prayed in addition that the land be restored to the public domain. But if the selections are otherwise good (and the Secretary has held them good) they cut out both Hoyt and Campbell, and it does not aid them to assert that the Railroad Company instead of the Railway Company should have had the land.

However, it may be well to point out that the *Railway* Company has purchased and succeeded to all the

rights of the *Railroad* Company. The proofs show that upon a bill filed by judgment creditors (not mortgage creditors) of the Northern Pacific Railroad Company, the Circuit Court, May 27, 1896, entered a decree of sequestration and appointed receivers (Transcript pp. 177-183). April 27, 1899, a final decree of sale was made, amended May 25, 1899 (Transcript pp. 145-156), ordering the sale to pay debts of all the lands in Minnesota, and rights to receive lands under grants from Congress or otherwise of the Northern Pacific Railroad Company. The Master's report of sale (Transcript pp. 156-177) was filed August 26, 1899, and a final decree confirming the sale was entered September 20, 1899 (Transcript pp. 184-187). The Master's report showed that the sale was made to the Northern Pacific Railway Company and it became a party to the final decree confirming the sale. The Circuit Court is therefore shown formally to have adjudicated in a proceeding properly before it the successorship of the Railway Company to the Railroad Company so far as the lands in suit are concerned. The plaintiff's allegation impeaches this decree.

The land having passed to the Railway Company in the manner shown, the question whether the mortgages executed by the Railroad Company and foreclosed against it in other proceedings in the Circuit Court (which mortgages did not cover the land in suit) were lawfully executed and properly foreclosed, is immaterial.

The proofs moreover show that in addition to the deed of the Special Master to the Railway Company and the deed of the receivers of the court to the Railway Company (Transcript pp. 189-197), the

Northern Pacific Railroad Company under the provisions of the decree executed and delivered a deed to the Railway Company, which conveyed all the lands and rights to land of the Railroad Company in the State of Minnesota. (Transcript pp. 197-201.)

And notwithstanding that the plaintiffs are in no position to raise the objection, we desire to show to the court that the Wisconsin act of 1895, printed as an exhibit to the bill (Transcript pp. 55-65), which authorizes the Superior & St. Croix Railroad Company, now Northern Pacific Railway Company, to purchase the railroad of the Northern Pacific Railroad Company (section 7 of which authorizes the company to purchase its land grant) was valid legislation. It was an act amending a private and local law of 1870, creating the Superior & St. Croix Railroad Company. November 7, 1871, an amendment to the constitution of Wisconsin was adopted, prohibiting certain special legislation. Among other kinds, legislation "for granting corporate powers or privileges, except to cities." In *Attorney General v. Railroad Companies*, 35 Wis. 425, and *Black River Improvement Company v. Holway*, 87 Wis. 584, it had been held, before the passage of the act of 1895 referred to, that the constitutional amendment did not impair the power of alteration and amendment by special act of charters passed prior to 1871. In *Attorney General v. Superior & St. Croix Railroad Company*, 93 Wis. 604, the Attorney General of Wisconsin unsuccessfully applied to the Supreme Court of the State for an information in the nature of *quo warranto* challenging the right of the Superior & St. Croix Company to exercise the franchises conferred by the amendatory act of 1895.

We refer the court to the opinion of the Secretary in this case citing opinions of Attorney General Harmon and Attorney General Moody holding the *Railway Company* to be lawful successor of the *Railroad Company*. (Transcript pp. 34, 35.)

3. The lands were not exempt from the Northern Pacific's selections because of the Lake Superior and Mississippi grant, or of anything done under it.

(a) There is nothing in the suggestion that the proviso in section 3 of the Northern Pacific act, which deducted from the grant to that company any lands theretofore granted by the United States to another railroad "as far as the routes are upon the same general line," operated to *deduct* from the lands granted to the Northern Pacific the lands within the conflicting limits of its grant and that of the Lake Superior and Mississippi Company. This for the good and sufficient reason that the two grants are not upon the same general route. One grant extended from St. Paul to the head of Lake Superior, approximately and substantially north and south. The other grant extended from Lake Superior to Puget Sound, approximately and substantially east and west. Whilst the two grants did not cross each other at perfect right angles, they did so approximately, as shown by the diagram printed opposite page 43, transcript. *Doherty v. Northern Pacific Ry. Co.* 177 U. S. 421; *United States v. Northern Pacific Railroad Co.*, 177 U. S. 435.

(b) It therefore follows that the lands used as a basis of loss for the selection in question were within the place limits of the Northern Pacific grant. They were not within the place limits of the Lake Superior and Mississippi grant, but only within its limits of

indemnity. Nor were they within the order of withdrawal of May 26, 1864, made under that grant (which distinguishes this case from *Northern Lumber Company v. O'Brien*, 204 U. S. 190, and *Northern Pacific Railroad Company v. Musser-Sauntry L. L. & Mfg. Co.*, 168 U. S. 604.) It is true that the base land was conveyed by the United States under the grant of May 5, 1864. But it *did not pass by that grant*. It passed because it fell within its indemnity limits, and was selected as indemnity *after the date of the Northern Pacific grant and prior to the definite location of that road*. Being lost therefore to the Northern Pacific grant, not before its passage, but after, it clearly formed the basis for a second indemnity selection (see opinion of Secretary, Transcript pp. 35, 36).

4. A good and sufficient answer to all criticisms upon the form or regularity of the selection list is, that the selections were by the terms of the act to be made subject to the approval of the Secretary of the Interior, and he has approved them.

But it may be suggested as a limitation upon the right of selection (a) that the selection must be made on the side of the railroad where the loss occurred.

From the beginning no such limitation under the Northern Pacific grant has ever been suggested by any Commissioner of the General Land Office or by any Secretary of the Interior. That the land department rules the other way and holds that selections under the Northern Pacific act are not thus limited is sufficiently indicated in its decisions set forth as exhibits in the record.

Neither is the limitation warranted by the language of the indemnity clause in question, which is:

> "And whenever, prior to said time, any of said sections or parts of sections shall have been granted, sold, reserved, occupied by homestead settlers, or pre-empted ,or otherwise disposed of, other lands shall be selected by said company in lieu thereof, under the direction of the Secretary of the Interior, in alternate sections, and designated by odd numbers, not more than ten miles beyond the limits of said alternate sections.'"

No qualification being imposed by Congress as to the side of the road upon which selection may be made, no such qualification can be inserted in the act by judicial legislation.

Counsel refers to the case of *United States v. Burlington and Missouri River Railroad Company*, 4 Dillon 297, affirmed 98 U. S. 334, as establishing that under the Northern Pacific grant selections of indemnity are confined to that side of the railroad on which the loss occurs. But an examination of those decisions shows that they are based on a peculiarity of the grant there considered. That grant did not provide indemnity and the decisions cited did not relate to indemnity but to *granted* lands. Section 19 of the Burlington and Missouri act, considered in the decisions cited, grants to that company every alternate section (except those reserved) designated by odd numbers *to the amount of ten sections per mile on each side of said road*. The opinion of Mr. Justice Miller was that this language conferred no right to take more on either side of the road than what amounted to ten sections per mile on that side, and that, if for any reason the required num-

ber of sections could not be found on one side, it was a loss for which indemnity was not provided in the act; that there existed therefore no power in the land department to issue patents for lands lying on the north side in lieu of lands deficient on the south side. This court said as to this that the grant contemplated one-half of the land to be taken on each side of the road and that the department could not enlarge the quantity on one side to make up the deficiency on the other. This case has therefore no bearing upon the question at issue.

The case of *Southern Pacific Railroad Company v. Smith*, 74 Fed. Rep. 588, seems to be like this and we submit that it was decided erroneously. It is contrary to the plain language of the act, as we have shown, and contrary to the unvarying ruling of the land department. We are advised moreover that the Circuit Court granted a rehearing in that case and ordered defendants to show cause why the decision should not be reversed; that no ruling was ever made upon this order to show cause because the case ceased to be important, the lands having been ascertained to fall within the conflicting grant of the Atlantic and Pacific Company.

(b) There is nothing in the suggestion, should it be made, that no selections can be made from the second indemnity limits until it is shown that the lands within the first indemnity limits along the entire line from Lake Superior to Puget Sound are exhausted.

Such a contention is flatly contradictory of the terms of the joint resolution of 1870, establishing the second indemnity limits. If the first three lines of that resolution had been framed with the specific intention to

make such an assertion impossible they could not have been more efficiently worded. The resolution means precisely what it says, that the right to second indemnity lands shall arise whenever, at the time of final location of the road, there is not *in any state or territory*, within the limits prescribed by the original charter, the amount of lands per mile granted to the company by Congress. The material part of the joint resolution reads as follows:

> "And in the event of there not being in any state or territory in which said main line or branch line may be located, at the time of the final location thereof, the amount of lands per mile granted by Congress to said company, within the limits prescribed by its charter, then said company shall be entitled, under the directions of the Secretary of the Interior, to receive so many sections of land belonging to the United States, and designated by odd numbers, in such state or territory, within ten miles on each side of said road beyond the limtis prescribed in said charter, as will make up such deficiency on said main line or branch except mineral and other lands, as excepted in the charter of said company of eighteen hundred and sixty-four, to the amount of lands that have been granted, sold, reserved, occupied by homestead settlers, pre-empted, or otherwise disposed of, subsequent to the passage of the act of July two, eighteen hundred and sixty-four."

That the first indemnity limits in Minnesota were deficient to furnish selections to make the losses good involved in the Hoyt and Campbell cases was necessarily adjudicated by the Secretary when he approved the selections and issued the patents. Upon settled rules we can say that his decision of this question of fact is conclusive.

5. It may be urged in the Hoyt case that the act of Congress of July 1, 1898 (30 Stat. 620), operates to give the plaintiff Hoyt the land in his suit and to compel the Railway Company to select elsewhere. Notwithstanding the statement of the Circuit Court of Appeals in the Campbell case, it seems clear that this question cannot be raised in that case; nor do we understand that Campbell's counsel so contends. Campbell, having no entry of record against the land, falls clearly outside the law in question and the act need only be considered with reference to the case of Hoyt.

The material provisions of the act are:

> "That where, *prior to January first, eighteen hundred and ninety-eight*, the whole or any part of an odd-numbered section, in either the granted or the indemnity limits of the land grant to the Northern Pacific Railroad Company, to which the right of the grantee or its lawful successor is claimed to have attached by definite location or selection, has been *purchased* directly from the United States *or settled upon* or *claimed in good faith by any qualified settler* under color of title or claim of right under any law of the United States or any ruling of the interior department, and where purchaser, settler, or claimant refuses to transfer his entry as hereinafter provided, the railroad grantee or its successor in interest, upon a proper relinquishment thereof, shall be entitled to select in lieu of the land relinquished an equal quantity of public lands, surveyed or unsurveyed, not mineral or reserved, and not valuable for stone, iron, or coal, and free from valid adverse claim, or not occupied by settlers at the time of such selection, situated within any State or Territory into which such railroad grant extends, and patent shall issue for the land so selected as though it had been originally grant-

ed: but all selections of unsurveyed lands shall be of odd-numbered sections, to be identified by the survey when made, and patent therefor shall issue to and in the name of the corporation surrendering the lands before mentioned, and such patents shall not issue until after the survey: *Provided however,* That the Secretary of the Interior shall from time to time ascertain and, as soon as conveniently may be done, cause to be prepared and delivered to the said railroad grantee or its successor in interest a list or lists of the several tracts which have been *purchased or settled upon or occupied as aforesaid, and are now claimed by said purchasers or occupants,* their heirs or assigns, according to the smallest government subdivisions. And all right, title, and interest of the said railroad grantee or its successor in interest in and to any of such tracts, which the said railroad grantee or its successor in interest may relinquish hereunder shall revert to the United States, and such tracts shall be treated, under the laws thereof, in the same manner as if no rights thereto had ever vested in the said railroad grantee, and all qualified persons who *have occupied and may be on said lands* as herein provided, *or who have purchased said lands in good faith as aforesaid,* their heirs and assigns, shall be permitted to prove their titles to said lands according to law, as if said grant had never been made; and upon such relinquishment said Northern Pacific Railroad Company or its lawful successor in interest may proceed to select, in the manner hereinbefore provided, lands in lieu of those relinquished, and patents shall issue therefor: *Provided further,* That the railroad grantee or its successor in interest shall accept the said list or lists so to be made by the Secretary of the Interior as conclusive with respect to the particular lands to be relinquished by it, but it shall not be bound to relinquish lands sold or contracted by it or lands which it uses or needs for railroad purposes, or lands valuable

for stone, iron, or coal; *And provided further*, That whenever any qualified settler shall in good faith make settlement in pursuance of existing law upon any odd-numbered sections of unsurveyed public lands within the said railroad grant to which the right of such railroad grantee or its successor in interest has attached, then upon proof thereof satisfactory to the Secretary of the Interior, and a due relinquishment of the prior railroad right, other lands may be selected in lieu thereof by said railroad grantee or its successor in interest, as hereinbefore provided, and patents shall issue therefor: *And provided further*, That nothing herein contained shall be construed as intended or having the effect to recognize the Northern Pacific Railway Company as the lawful successor of the Northern Pacific Railroad Company in the ownership of the lands granted by the United States to the Northern Pacific Railroad Company, under and by virtue of foreclosure proceedings against said Northern Pacific Railroad Company in the courts of the United States, but the legal question whether the said Northern Pacific Railway Company is such lawful successor of the said Northern Pacific Railroad Company, should the question be raised, shall be determined wholly without reference to the provisions of this Act, and nothing in this Act shall be construed as enlarging the quantity of land which the said Northern Pacific Railroad Company is entitled to under laws heretofore enacted: *And provided further, That all qualified settlers*, their heirs or assigns, who, prior to January first, eighteen hundred and ninety-eight, *purchased or settled upon or claimed in good faith*, under color of title or claim of right under any law of the United States or any ruling of the Interior Department, any part of an odd-numbered section in either the granted or indemnity limits of the land grant to the Northern Pacific Railroad Company to which the right of such grantee or its lawful successor is claimed to

have attached by definite location or selection, may in lieu thereof transfer their claims to an equal quantity of public lands surveyed or unsurveyed, not mineral or reserved, and not valuable for stone, iron, or coal, and free from valid adverse claim, or not occupied by a settler at the time of such entry, situated in any State or Territory into which such railroad grant extends, and make proof therefor as in other cases provided; and in making such proof, credit shall be given for the period of their *bona fide* residence and amount of their improvements upon their respective claims in the said granted or indemnity limits of the land grant to the said Northern Pacific Railroad Company the same as if made upon the tract to which the transfer is made; and before the Secretary of the Interior shall cause to be prepared and delivered to said railroad grantee or its successor in interest any list or lists of the several tracts which have been purchased or settled upon or occupied as hereinbefore provided, he shall notify the purchaser, settler, or claimant, his heirs or assigns, claiming against said railroad company, of his right to transfer his entry or claim, as herein provided, and shall give him or them option to take lieu lands for those claimed by him or them or hold his claim and allow the said railroad company to do so under the terms of this Act."

The purpose of the act is obvious—to furnish a means of adjustment of controversies between the Northern Pacific and the settlers within its grant. The cry for its passage came from homesteaders and preemptors who had gone onto lands under various rulings of the department, which had been overruled in the courts, or were there being challenged. The settler in danger of being dispossessed was alone in the mind of Congress. The government has ever been

tender of settlers upon the public lands, and the law would never have been passed to protect the timber or stone speculator.

The purpose of the law was to protect those who would be subjected to real loss and hardship if the claim of title of the railroad company should be sustained. Settlers under the homestead law, or under any other settlement law, would fall in that category. Not only would their improvements be lost, but their time of residence could not be credited to them upon entry of other lands. This was felt to be a real hardship. But a cash purchaser under the timber and stone law could by the failure of his purchase suffer no loss, except a loss of expected profits. His money would be repaid by the government. And so far as a mere applicant to purchase is concerned, he could suffer no loss of any sort. The equities of such purchasers and applicants under the timber and stone law could never have moved Congress to pass the act of 1898, and should not now move the land department and courts to any special effort to extend the act so as to include them.

The language of the act requires, first, that the right of the settler should have attached "prior to January first, eighteen hundred and ninety-eight," thus excluding conflicts created after that date. It is restricted carefully to lands, prior to the date named, "purchased directly from the United States or settled upon or claimed in good faith by any qualified settler under color of title or claim of right," etc. The last proviso allows "settlers, their heirs or assigns," to transfer their claims to other lands "not valuable for stone, iron or coal."

This statute should be construed not only with due regard to all the language therein contained, but in connection with prior similar legislation, namely, the acts of 1874 and 1890, which were acts for the relief of settlers only. The first clause of the act of 1898 may be read in two ways, depending on whether the words, "by any qualified settler," relate to and qualify the entire preceding clause, "has been purchased directly from the United States or settled upon or claimed in good faith," or whether they relate to and qualify only the words, "settled upon or claimed." The former interpretation is by far the more reasonable. The word "purchase" is used with reference to a purchase by a settler, and the distinction drawn between lands purchased and lands settled upon or claimed, was simply to make it clear that the act was intended to apply equally, whether the settler's rights had been consummated by purchase, or only initiated by settlement or claim.

Any doubt upon this subject seems to be put at rest by the subsequent provisions of the act. The last proviso clearly applies only to qualified settlers who purchased or settled in good faith. This clause is as free from ambiguity as language can be, and should settle whatever doubt arises from the loose construction of the first clause.

This interpretation is much strengthened by the fact that the timber and stone act is limited to lands valuable for timber or stone and unfit for cultivation. The act of 1898, in permitting the transfer of settlers' claims, provides that lands valuable for stone shall not be so taken. This proviso is manifestly inconsistent

with the view that the act was intended to cover timber and stone entries.

If our construction is not correct, the result is that the act of 1898, by being extended to lands acquired under the timber and stone law, is in direct conflict with the settled policy of land legislation. Such a construction permits a cash purchaser under the timber and stone law to take in lieu thereof agricultural lands without any settlement. The policy of disposing of agricultural lands for cash without residence and qualification was terminated by the repeal of the pre-emption law in 1891.

It should not be supposed by the court that the eastern terminal controversy played the slightest part in the passage of the act of 1898. It is demonstrable that that act was in fact passed for the relief of settlers, and without any reference to that controversy. There were substantially no controversies in the country involved in the eastern terminal question when the act of 1898 was passed. The decision of the supreme court of Wisconsin, which was the first concerning the eastern terminus, was made June 23, 1898, and the provision of the sundry civil bill under discussion was introduced as an amendment by Senator Wilson, of Washington, in March, 1898. All the lands of the Northern Pacific Railroad Company in Minnesota were at that time in the hands of receivers. The act was passed to assist settlers in the state of Washington, and some other settlers upon agricultural lands, whose settlements were jeopardized by the decision in *McHenry v. Nygaard*, 72 Minn. 2, decided April 22, 1898.

However, it is not necessary to determine whether *purchasers* under the timber and stone law are in-

cluded in the act of 1898. It is sufficient for this case to point out that Jones, under whom Hoyt claims title, had only filed an application for the land before the first of January, 1898, and paid his money and filed proofs December 10, 1898, with full notice of the railway company's rights, and under a receipt subordinating his entry to those rights. No vested right and no inchoate right had been acquired by Jones before the date fixed by the act of 1898. His application initiated no right as against the government, and prior to his final proof and payment the Secretary might suspend the land from sale and disposition under the public land laws. This is precisely what was done in this case. The tract was withdrawn from entry by the order of February 28, 1898, and the payment of Jones was allowed under a receipt expressly stipulating that such payment was subject to any claim of the railway company. The decisions of the department in the case of Jones, attached to the bill of complaint as exhibit "B" (Transcript pp. 33-41), and in the case of *Eaton v. Northern Pacific Ry. Co.*, 33 L. D. 426, leave little to be said.

It is hardly necessary to refer to the numerous decisions of this court in which it has been held, that where a statute is of doubtful meaning the settled interpretation of the land department will be followed by the court. *Hewitt v. Schultz,* 180 U. S. 139.

6. In conclusion, let us remind the court that the defendants have purchased in good faith from the patentee of the United States. The patent is not one issued inadvertently, and no suggestion is made of any fraud in obtaining it. Every fact and every question of law preliminary to its issue were fully argued

upon both sides, and carefully considered by the Commissioner of the general land office, and by the Secretary of the Interior. Both of those officers have decided every question in the case against the entrymen. The rule in such cases is well settled by a long line of decisions that the department's decision is conclusive as to the facts and cogent as to the law. It can only be overruled for a mistake of law, and the mistake must be clear. *Smelting Company v. Kemp,* 104 U. S. 636, 646; *Maxwell Land-Grant Case,* 121 U. S. 325, 379; *Barden v. Northern Pacific Railroad Co.,* 154 U. S. 288, 325-331.

CHARLES W. BUNN.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1909.

No. 397.

NORTHERN PACIFIC RAILWAY COMPANY, PLAINTIFF IN ERROR, APPELLANT IN THE SUPREME COURT OF THE STATE OF MINNESOTA, AND PLAINTIFF IN THE DISTRICT COURT OF TODD COUNTY IN SAID STATE.

vs.

FRED WASS AND PAULINE WASS, HIS WIFE, DEFENDANTS IN ERROR, RESPONDENTS IN THE SUPREME COURT OF THE STATE OF MINNESOTA AND DEFENDANTS IN THE DISTRICT COURT OF TODD COUNTY IN SAID STATE OF MINNESOTA.

WRIT OF ERROR FROM THE SUPREME COURT OF THE STATE OF MINNESOTA.

MOTION FOR ADVANCEMENT ON DOCKET.

Now comes Fred Wass and Pauline Wass, his wife, by their solicitor, P. B. Gorman, and moves the court that the above entitled cause be advanced upon the Docket of this court to such date and time as may to the court seem most convenient that the same may be speedily heard and determined.

Statement of Matter Involved.

I.

Plaintiff in Error, Appellant in the State Supreme Court, and Plaintiff in the court below, alleges in its complaint that it is a corporation duly organized and existing under the laws of the State of Wisconsin, that it is the owner of and entitled to the immediate possession of the following described land, towit: the south east quarter of section thirteen (13) township one hundred and twenty-nine (129) north of range thirty-two (32) west of the fifth principal meridian, situate in Todd County, Minnesota, and containing one hundred sixty (160) acres more or less according to the government survey thereof, and that this action in ejectment is brought to recover possession thereof.

II.

The record in the case shows that plaintiff in error claims to be the owner of said described land under the indemnity provision of a land grant made to the Territory and subsequent State of Minnesota by acts of Congress approved March 3, 1857; March 3, 1865; and March 3, 1871, to aid in the construction of railroads in said state, and it appears also in the record that the railway company's application to select the same, as lieu land, was approved by the Secretary of the Interior February 12, 1905, and that patent therefor was on March 15, 1905, issued to the State of Minnesota for the benefit of the railway company entitled thereto.

III.

In its Complaint herein, plaintiff in Error prays judgment against defendants.

(1) for the recovery of the above described land.

(2) for the sum of one hundred ($100.00) dollars per year as rents, issues, and profits from June 2, 1905, to the date when said premises shall be restored to the possession of plaintiff,

(3) and for its costs and disbursements herein.

IV.

Fred Wass, one of the defendants in Error, one of the respondents in the State Supreme Court, and one of the defendants in the court below, alleges in his answer that he is the equitable owner of the land above described, and that he is entitled to possession of the same under the provisions of the homestead laws of the United States, by reason of his settlement upon and his application to enter the same, as a homesteader, under the public land laws in the year 1899, as more specifically set forth in defendant's answer herein, and by reason of his improvements made from year to year and his continuous residence thereon from the month of April, 1899, to the present time, and for more than five years prior to the date, February 12, 1905, on which said described land was approved to the railway company as lieu land, by the Secretary of the Interior.

V.

In his answer, defendant in error, Fred Wass prays judgment against plaintiff in Error:

(1) That plaintiff's prayer be refused, rejected, overruled, and denied,

(2) That the Northern Pacific Railway Company may be declared and held trustee of the legal title of said lands for defendant, Fred Wass' use and benefit,

(3) That the said Northern Pacific Railway Company be required by order and decree of this court, to convey the legal title of said described land to defendant, Fred Wass, for his own use and benefit by good and sufficient deeds of conveyance and

(4) That defendants have judgment for their costs and disbursements herein.

VI.

In the district court in the aforesaid county and state, plaintiff demurred to defendants answer, in the above entitled cause, thereby admitting the allegations and statements in the said answer contained.

After argument heard for and against said demurrer, the same was overruled by the court, and, on appeal, the order overruling said demurrer was upheld, and in all things affirmed, by the Supreme Court of the State of Minnesota.

VII.

In accordance with the judgment and mandate of said Supreme Court of the State of Minnesota, judgment was entered in the office of the clerk of the said District Court of Todd County, Minnesota, in accordance with the prayer of defendant's answer, in favor of the defendant, Fred Wass, and against plaintiff.

VIII.

An appeal was taken from the judgment entered as aforesaid in defendants' favor, to the Supreme Court, which adhered to and reaffirmed its former decision in the case. From this latter decision of the State Supreme Court the case comes here on Writ of Error.

IX.

The reasons and grounds for the application are:

(1) The case at bar has been in controversy between defendant in Error, and the railway company in interest, for ten years, or since the summer of 1899, as follows: first in the local land office at St. Cloud, Minn., later in the general land office in Washington, again in the Interior Department, also in the district court of Todd County, in the State Supreme Court of Minnesota, and finally, now since March, 1909, pending in this court.

(2) Defendant's means are exhausted by reason of the costs and expense incident to the long course of litigation, extending as above stated through so many years..

(3) Defendant's credit also, is impaired by reason of the rejection, by the United States Land Department, of his claim for the land in suit, and the issue of patent therefor to the Northern Pacific Railway company under the indemnity provisions of its land grant.

(4) Owing to his want of means and of credit, it will be very difficult for defendant, Wass, to hold out and remain in possession of his said claim unless his case be taken up out of order and argued at such early day as may be convenient for the court.

(5) *Affidavit of Defendant in Error, Fred Wass.*

(Original on file in the office of clerk of this court.)

IN SUPREME COURT OF THE UNITED STATES.

NORTHERN PACIFIC RAILWAY COMPANY,
Plaintiff in Error.

vs.

FRED WASS AND PAULINE WASS, HIS WIFE,
Defendants in Error.

Involving title to the Southeast quarter of Section number thirteen (13), Township one hundred twenty-nine (129), north of range thirty-two (32), west of the fifth Principal Meridian.

STATE OF MINNESOTA, COUNTY OF TODD.

Fred Wass being first duly sworn doth depose and say that he is defendant in the above entitled case, that he is the homestead claimant, who has resided upon, improved and cultivated the above described land for the ten years last past, and who applied to enter the same as a homestead in the year 1899, that the title to the above described land has been in controversy between himself and the railway company for the last ten years as follows: First, in the local land office in St. Cloud, Minn., later in the general land office at Washington, again in the Interior Department, also in the district court of Todd County, in the Supreme Court of Minnesota, and finally, now, since March, 1909, pending in this court, that the land in question is valuable for farming purposes only, and is worth, at the present time not to exceed four thousand ($4,000) dollars at the outside, that this affiant has no other property, whatsoever, except his interest in this land, his farm implements, his team of horses and a few head of other live stock, that by reason of the costs and expenses thus far necessarily incurred, in the contest with the railway company his means, slender at the beginning and always small, are exhausted, that by reason of the rejection of his claim by the United States Land Department, and the granting of a patent for same to the railway company his credit is seriously impaired and to such a degree that it is nearly or quite impossible for

him to continue the contest against the said railway company unless the case be argued and determined at such early day as may be convenient for the court

(Signed) FRED WASS.

Subscribed and sworn to before me a notary public in and for the County of Morrison, and State of Minnesota, this 19th day of July, 1909.

(Signed) CHARLES E. STITH.

(SEAL)

Notary Public, Morrison County, Minn.

My Commission Expires Feb'y. 13, 1913.

STATE OF MINNESOTA, COUNTY OF TODD.—ss.

(6) William Seims and James W. Cofield being first duly sworn, each for himself doth depose and say that he has read the foregoing affidavit and knows the contents thereof, and that the same is true of his own knowledge except those things that he has on information and belief and as to those things he believes it to be true, and further deponents saith not except that they have each known Fred Wass and the land in question for at least ten years, and that this statement is made to corroborate the foregoing affidavit of Fred Wass.

(Signed) WILLIAM SEIMS,

JAMES W. COFIELD.

Subscribed and sworn to this 19th day of July, 1909, before me a notary public in and for the said County of Morrison and State of Minnesota.

(Signed) CHARLES E. STITH.

(SEAL)

Notary Public, Morrison County, Minnesota.

My Commission Expires Feb'y. 13, 1913.

(7) The long delay already suffered in this case, the want of further means and of further credit, on the part of defendant in Error to continue the controversy to the end in its regular order, together with the difficulty of remaining in possession of the land under present conditions are such special and peculiar circumstances as may be deemed sufficient cause for taking up the case out of order and advancing the same on the docket under sub-division number seven (7) or rule twenty-six (26) of the Rules of this Court.

(8) There are several other cases, perhaps more than an hundred, in the counties of Morrison and Todd, in the State of Minnesota, involving the same question and the same issue, presented for the consideration of the Court in this case, in each and all of which the lands have been in controversy between the settlers and the railway company for several years last past, and these and other homestead claimants are in doubt and in great perplexity as to what is best for them to do, until a decision in this case is announced by the Court. There are many similar cases, involving the same question, in other parts of the State of Minnesota, and in other Northwestern states, so that an early decision in this case would be of great benefit to a large number of people in the Northwestern states.

(9) Should the Court find the grounds above assigned not sufficient to advance the case under subdivision seven (7) of the said rule, then and in that case we beg leave to have the case advanced on the docket under sub-division eight (8) of the rule above cited, upon the ground, and for the reason that the only question at issue in the case at bar, to-wit: is land in odd numbered sections lying within the indemnity limits of a rail-

road land grant, in the State of Minnesota, subject to entry under the public land laws of the United States, while an application, by the railway company, to select the same, as lieu land, is pending before the Secretary of the Interior and before the said Secretary has approved the same to the railway, is likewise the only question involved in the case of Weyerhauser et al, vs. Hoyt, docket number 195, Oct. Term, 1909, now pending in this court.

(10) Messrs. Weyerhauser, et al, in that case and the Northern Pacific Railway Company in the case at bar, each, and both, contend that the aforesaid question should be answered in the negative, while Mr. Hoyt in his case and Mr. Wass in the case at bar, ask the court to answer the said question in the affirmative.

(11) The general solicitor of the Northern Pacific Railway Company, Charles W. Bunn Esq., appears as counsel and attorney of record in each of these two cases, in the case at bar, he appears for the Northern Pacific Railway Company and in the other case he appears for Messrs. Weyerhauser et al, both of which parties are asking that the question involved be answered in the negative, and he could cover the question at issue in each and in both of them in one and the same oral argument.

(12) The other side of the said question, which both Mr. Hoyt and Mr. Wass ask to be answered in the affirmative could be argued by the attorneys of record in the respective cases, without unnecessary repetition under the direction of the Court.

(13) Mr. Fred Wass, defendant in error, in the case at bar, would prefer to have his case advanced for argu-

ment under sub-division seven (7) of the aforesaid rule, as, *under present conditions,* a delay until the Messrs. Weyerhauser et al, is reached in order will be embarrassing to Mr. Wass, who, therefore respectfully asks that argument may be heard in his case at the earliest day convenient for the court.

(14) Should request in foregoing paragraph not be granted then, we will be pleased to avail ourselves of the privilege, if allowed, to take up the case under sub-division eight (8) of the said rule at the same time that the case of Weyerhauser et. al, vs. Hoyt is being argued.

Respectfully submitted,

P. B. GORMAN.

Solicitor for Defendants in Error, St. Cloud, Minn.

IN UNITED STATES SUPREME COURT.

NORTHERN PACIFIC RAILWAY COMPANY,
Plaintiff in Error.

vs.

FRED WASS AND PAULINE WASS, HIS WIFE,
Defendants in Error.

NOTICE OF MOTION.

Sir:—

Please take notice that a motion, a copy of which is set forth in the foregoing pages and herewith served upon you, will be made in the Supreme Court of the United States on Monday, the 18th day of October, 1909, at 12 o'clock m., of that day, or as soon thereafter as counsel can be heard, to advance the above entitled case on the docket of said court so that argument may be heard in said case at such early day as may be convenient for the court.

Dated at St. Cloud, Minn., August 9, 1909.

P. B. GORMAN.

Solicitor for Defendants in Error, St. Cloud, Minn.

To Charles W. Bunn Esq.,

Solicitor for Plaintiff in Error, St. Paul, Minn.

Due service of the foregoing notice is hereby admitted this 10 day of August, 1909.

(Signed) Charles W. Bunn

Solicitor for Plaintiff in Error, St. Paul, Minn.

Office Supreme Court, U. S.
FILED
FEB 28 1910
JAMES H. McKENNEY,
Clerk

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1909

No. [redacted] 181.

NORTHERN PACIFIC RAILWAY COMPANY,

Plaintiff in Error,

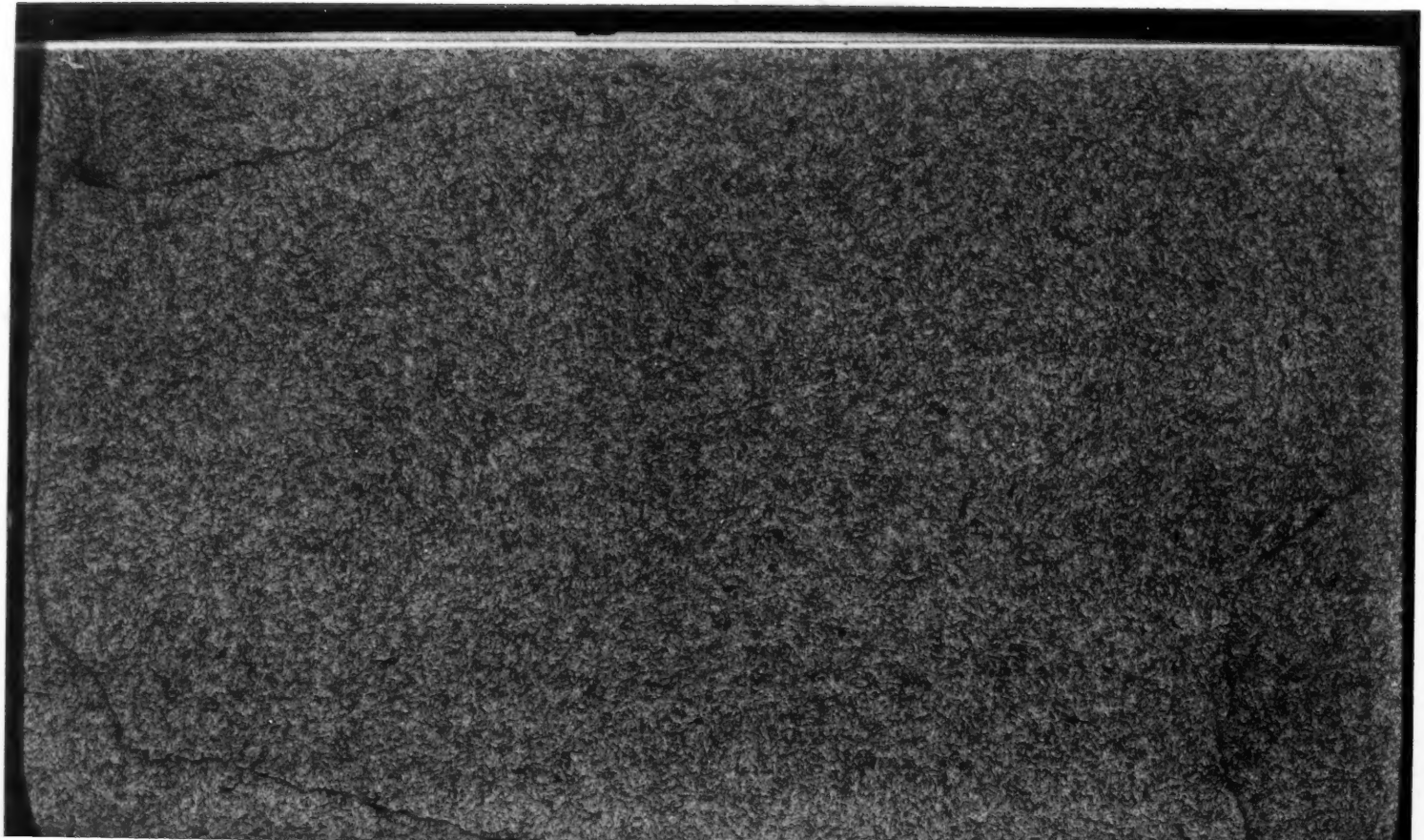
vs.

FRED WASS and PAULINE WASS,

Defendants in Error.

BRIEF FOR DEFENDANTS IN ERROR.

P. B. GORMAN,
SOLICITOR FOR DEFENDANTS IN ERROR,
ST. CLOUD, MINN.



SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1909

NORTHERN PACIFIC RAILWAY COMPANY,

Plaintiff in Error.

vs.

FRED WASS AND PAULINE WASS, His Wife,

Defendants in Error.

STATEMENT.

The land, here in controversy, lies within the indemnity limits of the land grant made to the Territory of Minnesota by act of Congress approved March 3, 1857, and also within the indemnity limits of the grant made to the State of Minnesota by the act of Congress approved March 3, 1865, and is described as follows: The southeast quarter (SE$\frac{1}{4}$) of section thirteen (13), township one hundred twenty-nine (129), north of range thirty-two (32) west of the fifth principal Meridian and situate in Todd County, Minn.

Twenty years after the passage of the act of Congress making this land grant, and after unsuccessful attempts to secure the building of that part of one of its branch lines of railroad, lying between Watab and Crow Wing, the said State of Minnesota, by an act of its legislature, approved March 1, 1877, conferred all its interest and right in and to the aforesaid land grant, upon the Western Railroad Company of Minnesota, which company proceeded to build, and did build, equip, and operate a line of railroad between the points above mentioned, and, in the fall of 1877, said company filed, in the General Land office a list of applications to select indemnity land, which list embraced the tract here in controversy.

Subsequently and after the building of the line of road from Watab to Crow Wing in said state, the said Western Railroad Company of Minnesota was reorganized under the name of St. Paul and Northern Pacific Railway Company.

And thereafter by means of legal proceedings the Northern Pacific Railway Company came into possession of the land grant, here involved, and thus became the legal successor of the Western Railroad Company of Minnesota.

As stated above the Western Railroad Company of Minnesota applied to select the tract above described, as indemnity land, in the fall of 1877, but failed and neglected, at that time or at any time, to designate a loss, in its primary limits, as a basis for the purposed selection. Twelve years

later, and in 1889, the same company under its new name, St. Paul and Northern Pacific Railway Company, again applied to select this tract as indemnity, but, as in the former application, failed and neglected to specifiy a basis for the purposed selection. February 1892 the company applied, a third time, to select this tract as lieu land and designated, for the first time, a basis for the selection.

Neither of the above mentioned three applications was approved by the secretary of the Interior, as required by law, or otherwise, and each and all of said applications, were invalid and without force or effect, at the time Fred Wass settled upon said land in April 1899, with the bona fide intention of entering it under the homestead law, and at the time he presented his homestead application, therefor, to the Register and Receiver of the district, wherein the land was located, in the fall of 1899.

In the spring of 1899, Defendant in error, Fred Wass, went upon the land, built a house and moved his family into it, and has remained in possession and occupancy continuously up to the present time, and he is living there now. The same summer he built a stable, dug a well, and made such other and further improvements upon the place, as were found to be necessary and convenient for a poor family just starting out on a homestead. He has added to his improvements, each year, in the way of grubbing, clearing and breaking until,

at the beginning of this suit, his improvements were worth and of a value in excess of twelve hundred dollars.

In December, 1899, Mr. Wass made application at the local land office in St. Cloud, to enter the land under the provissions of the homestead law. His application was rejected, by the local officers, and his money, tendered as fees and commissions, was refused upon the ground, that the land applied for was embraced in a then pending though unapproved indemnity selection theretofore, applied for by the St. Paul and Northern Pacific Railway Company.

Mr. Wass appealed from the ruling of the local officers and their action was approved and affirmed by the Commissioners of the General Land Office, and by the Secretary of the Interior, respectively.

In February, 1905, the Secretary of the Interior approved the application of the company to select this land, and, on the 15th day of March of the same year, a patent therefore was issued by the United States, to the State of Minnesota for the benefit of the railway company entitled thereto, and thereafter, the patent of the State of Minnesota for said land, was issued to, and in favor of, the Northern Pacific Railway Company, Plaintiff in error herein.

Wass and his family were in possession of and occupying the place as a home, at the time the patent was issued to the railway company by the State of Minnesota. The company brought an ac-

tion in ejectment against Wass and his wife to oust them from possession. The case was tried in the district court of Todd County, before the court, without a jury, and judgment rendered as shows in the record (page 10 to 13) in favor of Defendants Wass and wife.

On appeal the decision of the trial court was affirmed by the supreme court of Minnesota (record page 22 to 29) and the questions involved are brought here from that court on a writ of error.

QUESTIONS INVOLVED.

The only question involved in this case is, are lands in odd numbered sections within the indemnity limits of a railroad land grant, open to occupancy and entry under the homestead law, while the railway company's application to select them, as lieu land, is pending before the Secretary of the Interior. Or, putting it in another form, can lands in the indemnity limits of a railroad land grant, be designated selected before the company's application for same is approved by the said Secretary?

ARGUMENT.

Defendants in error contend that the decision of the supreme court of Minnesota, in the case at bar, should be upheld and affirmed in all respects, upon the ground and for the reasons:

1. This court has jurisdiction of the case.

2. The railway company's application to select the land, here in suit, did not segregate it from the public domain, or reserve it from entry under the homestead law.

3. The common law Fiction of relation cannot be applied to this case, so as to divest the interest and right of a homestead claimant who is living upon the land and has applied to enter it as a homestead before the Secretary of the Interior has approved the company's application.

4. The rights and interest of Fred Wass, as a homestead claimant, were not affected by the refusal of the local officers to approve and allow his homestead application when it was presented to them, in the fall of 1899.

We will consider these points in the above order, and cite same authorities in support of our views upon each of them.

I.

As to the jurisdiction of the court, in this matter, no question has been raised by either party and we cite authority only as a matter of percaution. After a disputed land claim, for any tract of public land has been heard, considered and determined, and patent therefor issued by the Secretary of the Interior, courts of equity have jurisdiction and will afford relief to either of the contesting parties, who may have suffered wrong, or who has been un-

justly and illegally deprived of any substantial right, or denied any substantial privilege.

Hewett vs. Schultz, 180 *U. S.* 136.

Marquez vs. Fresbre, 101 *U. S.* 473.

Johnson vs. Tawsley, 13 *Wall.* 72.

Moone vs. Robbinson, 96, *U. S.* 530.

Minnesota vs. Batchelder, 1 *Wall*, 109.

Tarpey vs. Madsen, 178 *U. S.* 215.

Sytle vs. Arkansas, 9 *Haw.* 614.

Ard vs. Brandon, 156 *U. S.* 537.

Shepley vs. Cawan, 91 *U. S.* 330.

In the case of *Hewett vs. Schultz* the court said:

> "Of course, if the ruling of that office is plainly erroneous, it would be the duty of the court to give effect to the will of Congress, for it is the settled doctrine of this court that the practice of a department, in the execution of a statute is material only when doubt exists as to its true construction."

In *Marquez vs. Fresbre* it is declared:

> "But if it can be made entirely plain to a court of equity that, on facts about which there is no dispute, or no reasonable doubt, the officers of the land department have, by a mistake of law, deprived a man of his right, it will give relief."

In *Minnesota vs. Batchelder* it is announced:

> "A court of equity will look into the proceedings before the Register and Receiver and even into those of the land office and other offices, where the right of property of the party is involved, and correct errors of law and fact to his prejudice."

In the case of *Johnson vs. Tawsley* the court holds:

"On the other hand it (the court) has constantly asserted the right of the proper court to inquire, after title had passed from the government, and the question became one of private right, whether, according to the established rule of equity, and the act of Congress concerning the public lands, the party holding the title should hold absolutely as his own or as trustee for another."

II.

The indemnity provisions of the railroad land grant acts of Congress made from time to time in the past, were drawn in language substantially alike, or, at any rate, the difference in the provisions of the respective grants, are so slight as to be immaterial in the consideration of the case at bar. So that the general rules of construction applied in the decision of other cases involving conflicting claims for indemnity land, will apply to this case also with equal force and with like weight.

We admit that it is well settled, by decisions of this Court, that in the primary limits the title in and to all those odd numbered sections, not excepted from the operation of this grant, is vested in the Company, instanter, as soon as an approved map of the definite location of their line of road, is filed in the General Land Office, and that, thereafter, no right will attach to any such odd numbered section, within the granted limits, in favor of an individual entry man, under the public land laws:

And we assert that it is equally well settled by

decisions of this Court, that no interest, right or title in or to any particular tract, within the indemnity limits, will attach in favor of the Company, at the time of filing the map of definite location of the line of road, at the time of filing application to select lieu lands, or at anytime until the Company's application to select has been approved of by the Secretary of the Interior.

The Railroad Company's application to select the land, here in suit, did not segregate it from the public domain, or reserve it from occupancy and entry under the homestead law of the United States, for the reason that the outer line of the indemnity limits of this land grant means nothing whatever, to or for the public, since the odd numbered sections within the indemnity limits are not granted to the state for the benefit of any railroad company, or otherwise, they must remain and be a part of the public domain and, like all other parts and portions of the public lands, are subject to be sold, granted, reserved, or otherwise disposed of by Congress, and, at the same time, they are also subject to occupancy and entry under the provisions of the homestead law.

The only service, of any kind, rendered or that can be rendered by the outside line of the indemnity limits of this grant, is that it restrains the company from taking public lands, outside to supply deficiencies within the granted limits.

Our contention is, in short, that, while the outer line of the indemnity limits restrains the Company

from going beyond it, in making applications for lieu lands, it is no bar to the public seeking homesteads on the interior of that line, that all odd numbered sections within indemnity limits of this grant, were open to the public, to be taken under the public land laws, as well as, at the same time, they were open to the Company to be applied for as lieu lands, that the mere occupancy of the individual homestead claimant, who had made no application, at the proper land office, to enter his claim, gave him no right as against the valid selection of the Company, and that the mere unapproved application of the Company to select as lieu land, does not debar or hinder the approval and allowance of a homestead entry on same land.

Opposing counsel disputes our contention "that the Company's unapproved application to select the land, here in controversy as lieu land, does not segregate the said tract from the public domain, or hinder the approval and allowance of a homestead entry upon the same, made in good faith, by a qualified homestead claimant."

We believe that the best evidence in support of our views, in this matter, is to be found in reported decisions heretofore rendered by this Court, and, therefore, we beg leave, at this time, to quote from a few leading cases in point.

The Court said: In the case of *Ryan vs. Central Pacific Railroad Company;* 99 *U. S.* 382; *Decided* 1879:

"Under the statute when the road was lo-

cated and the maps were made, the right of the Company to the odd sections first named became, ipso facto, fixed and absolute. With respect to the "lieu lands, as they are called, the *right was only* a *float* and *attached* to *no particular tracts, until* the selections were actually made *in the manner prescribed.*

In the case of *Cedar Rapids, etc., Railroad Company vs. Herring* 110 *U. S.* 27. Decided in 1884.

"It is obvious, however, that the right to these odd sections and the right to others, in lieu of such odd sections as have been previously disposed of, depend on very different circumstances, and it is not easy to see how rights could be vested in any particular section or sections of the latter class, until it is ascertained how many of the original odd numbered sections are thus lost, and until the grantee has exercised his right of selection. The latter unlike the odd numbers, within the six mile limit, are not ascertained and made specific by the protraction of the established line through the map of the public lands. They are not and cannot be made specific until the grantee's right of selection has been exercised. This Court, in construing the same clause of the grant to the California and Oregon Railroad Company 14 Statute at Large 239 said: "When the road was located and the maps were made the right of the Company to the odd sections first named became fixed and absolute. With respect to the "lieu lands," as they are called, the right was only a float, and attached to no particular tracts, until the selection was made *in the manner ~~presented~~ prescribed.*' "

Kansas Pacific Railroad Company vs. Atchinson, Topeka and Sante Fe Railroad Company. 112 *U. S.* 414, decided in 1884:

"The question, therefore, for determination

is, whether the grant to Kansas by Act of Congress of March 3, 1863, covered the title to these indemnity lands. We are clear that it did not. It granted only alternate sections designated by odd numbers, within the limit of ten miles, and from them certain portions were to be excepted. For what were thus excepted, other lands, were to be selected from adjacent lands, if any there remained to which no other valid claims originated. But what unappropriated lands would thus be found and selected could not be known before actual selection. A right to select them within certain limits, in case of a deficiency within the ten mile limit, was alone conferred, not a right to any specific land, or lands capable of identification by any principle of law or rules of measurement; neither locality nor quantity is given from which such lands could be ascertained. If, therefore, when such selections were to be made, the land from which the deficiency was to be supplied had been appropriated by Congress to other purposes, the right of selection became a barren right, for until selection was made the title remained in the government subject to be disposed of at its pleasure."

St. Paul and Sioux City Railroad Company vs. Winona and St. Peter Railroad Company 112 *U. S.* 720 decided in 1884:

"The reason for this is that no vested right can attach to land in place, the odd numbered sections within six miles of each side of the road, until these sections are ascertained and identified by a legal location of the line of road, so in regad to the lands to be selected within a still larger limit, their identification can not be known until the selection is made. It may be a long time after the line of road is located before it is ascertained how many sections or

parts of sections within the primary limits have been lost by sale or preemption. It may be still longer before selection is made to supply the loss. The plaintiff in error insists, that the map of its line of road was filed in 1859. The Court of original jurisdiction finds that up to the time of trial in October, 1878, a period of nearly twenty years, no selection of these lands had ever been made by the company or by anyone for it. Was there a vested right in this company during all of this time to have not only these lands, but all the odd numbered sections within the twenty mile limit, on each side of the line of road await its pleasure? Had the settlers in that populous region no right to buy of the government, because the company might choose to take them, or might after all that delay, find out that they were necessary to make up deficiencies in other quarters? How long were such lands to be withheld from market, and withdrawn from taxation and forbidden to cultivation?"

Barney vs. Winona and St. Peter Railroad Company, 117 *U. S.*, 228., *Decided* 1886

"In the construction of land grant acts in aid of railroads, there is a well established destinction observed between "granted lands" and "indemnity lands." The former are those falling within the limits especially designated and the title in which attaches, when the lands are located by an approved and accepted survey of the line of the road, filed in the Land Department, as of the date of the act of congress. The latter are those lands selected in lieu of parcels lost by previous disposition and reservation for other purposes and the title of which accrues only from the time of their selection."

Sioux City and St. Paul Railroad Company vs.

Chicago, Milwaukee and St. Paul Railway Company, 117 *U. S.*, 406, *Decided* 1886:

> "In the opinion above referred to it was held that while this rule applied to what are called lands in place, that is, those odd sections found within ten miles limit of the road, as those ten miles conflict with each other, it did not apply to lieu lands or indemnity lands which were to be selected outside of the ten mile limit. The reason of this was said to be that, with regard to the odd sections found within the original limits of the grant undisposed of when the line of road was definitely located, that location ascertained the sections which passed by the grant and fixed the right to such sections whether it was the whole or the moiety of them. But no title to indemnity lands was vested until a selection was made by which they were pointed out and ascertained and the selection made, approved by the Secretary of the Interior."

Wisconsin Central Railroad Company vs. Price County et al, 133 *U. S.* 496, decided 1890

> "But as to the remainder of the lands taxed, which fell within the indemnity limits, the case is different. For such lands no title could pass to the company, not only until the selections were made by the agents of the state appointed by the governor, but until such selections were approved by the Secretary of the Interior. Bnt that officer never approved of them, nor can such approval be inferred from his not formally rejecting them. "The approval of the Secretary was essential to the effacacy of the selections and to give to the company any title to the land selected. His action in that matter was not ministerial but judicial. He was required to determine, in the first place, whether there were any deficiencies

in the land granted to the company, which were to be supplied from indemnity lands, and, in the second place, whether the particular lands selected could be properly taken for those deficiencies. In order to reach a proper conclusion on these two questions he had also to inquire and determine whether any lands in the place limits had been previously disposed of by the government, or whether any preemption or homestead right had attached before the line of the road was definitely fixed. There could be no indemnity unless a loss was established. And in determining whether a particular selection could be taken as indemnity for the losses sustained, he was obliged to inquire into the condition of those indemnity lands and determine whether or not any portion of them had been appropriated for any other purpose, and if so, what portion had been thus appropriated and what portion still remained. "Until the selections were approved, there were no selections, in fact, only preliminary proceedings taken for that purpose, and the indemnity lands remained unaffected in their title. Until then the lands which might have been taken as indemnity were incapable of identification, the proposed selections remained the property of the United States.

The government was indeed, under promise to give the company indemnity lands in lieu what might be lost by the cases mentioned. But such promise passed no tile, and, until it was executed, created no legal interest that could be enforced in the courts."

After referring to some former decisions involving indemnity land questions, the court concludes this Wisconsin Central case by saying:

"The uniform language is, that no title to indemnity lands becomes vested in any company or in the state until the selections are

made; and they are not considered as made until they have been approved, as provided by statute, by the Secretary of the Interior."

United States vs. Missouri, Kansas and Texas Railway Company, 141 *U. S.* 358, decided 1891:

"We say prior to such selection and approval, because as to lands which may be legally taken for purposes of indemnity, the principle is firmly established that title to them does not vest in the railroad company, for the benefit of which they are contingently granted, but in the fullest legal sense remains in the United States until they are actually selected and set apart, under the direction of the Secretary of the Interior especially for indemnity purposes.

New Orleans Pacific Railway Company vs. Parker 143 *U. S.* 42, decided 1892:

"Now it has long been settled that while a railroad company, after its definite location acquires an interest in the odd numbered sections within its place or granted limits, which interest relates back to the granting act, the rule is otherwise as to the lands within the indemnity limits. As to lands of the latter class, the company acquires no interest in any specific section until a selection is made with the approval of the Land Departmennt.

"Having regard to the adjudicatal cases it is to be taken as established that unless otherwise expressly declared by congress, no right of the railroad company attaches or can attach to specific lands within indemnity limits until there is a selection under the direction of the Secretary of the Interior."

Humbird vs. Avery, 195 *U. S.* 480, Decided 1904:

"This conclusion is fortified, if not absolutely demanded by another consideration, namely, that no title to intemnity lands is

vested until a selection be made by which they are definitely ascertained and the selection made approved by the Secretary of the Interior. This principle is firmly established. A full statement of it is found in the *Wisconsin Central Railroad Company vs. Price County*, 133 *U. S.* 496.

Sjuli vs. Dreschel, 199 *U. S.* 564, decided 1905:

"That no rights to lands within indemnity limits will attach in favor of the railroad company until after selections made by it with the approval of the Secretary of the Interior."

"That up to the time such approval is given, lands within idemnity limits, although embraced by the company's list of selections, are subject to be disposed of by the United States, or to be settled upon and occupied under the preemption and homestead laws of the United States," and

"That the Secretary of the Interior has no authority to withdraw from sale or settlement lands that are within indemnity limits, which have not been previously selected, with his approval to supply deficiencies within the place limits of the company's road." * * *

"The company's unapproved selections did not therefore, stand in the way of the lands being occupied and entered under the homestead laws. The mere filing of its lists of selections of indemnity lands did not have the effect to exclude them from occupancy under the preemption and homestead laws. On the contrary, notwithstanding the filing of such lists, they remain open as before, to settlement or occupancy under those laws until the selections were formally approved by the Secretary of the Interior and the lands withdrawn from settlement or sale."

In the late case of *Brandon vs. Ard*, 211 *U. S.* 11, decided in 1908, after reviewing the facts of the

case, the court refers to, quotes from at length, and follows, as the law of the case, the doctrine announced in the Sjoli case, thus saying to the profession and to the public, that the rules laid down in that case were general in their application, whereever there are conflicting claims between an individual entryman and a railroad company for lands within its indemnity limits.

On the authority of all these cases hereinbefore referred to we assert that the rule laid down so clearly in the Sjoli case, also governs and disposes of the case at bar.

It is irrelevant that Sjoli settled upon his claim in 1884, and prior to the company's application to select it, in 1885, since he did not apply to enter it as a homestead or otherwise, until 1889, four years after the company's application.

It is well settled that an individual entryman acquires no interest in lands as against a railroad company by mere occupancy, or until he has made application to the proper local land office to enter his claim under some one or other of the public land laws.

Kansas Pacific Railroad Company vs. Dunmeyer, 113 *U. S.*, 629;

Hastings and Dakota Railroad Company vs. Whitney, 132 *U. S.*, 357;

Whitney vs. Taylor, 158 *U. S.*, 85;

Northern Pacific Railroad vs. Colburn, 164 *U. S.* 383;

Northern Pacific Railroad Company vs. Sanders, 166 *U. S.*, 620.

Tarpey vs. Madsen, 178 *U. S.*, 214.

In the Tarpey case last above cited, the Court says:

> "Oral evidence, therefore, of the date of occupancy, may be decisive of the controversy between such individual applicants for a tract of public land, but by decisions of this Court running back to 1882, as between a railroad company holding a land grant and an individual entryman, the question of right has been declared to rest, not on the mere matter of occupancy, but upon the state of the record."
>
> "Recapitulating, we are of opinion that a proper interpretation of the acts of congress making railroad grants like the one in question, requires that the relative rights of the company and an individual entryman must be determined, not by the act of the company in itself, fixing definitely the line of its road, or by the mere occupancy of the individual, but by record evidence on the one part, the filing of the map in the office of the Secretary of the Interior, and, on the other the declaration and entry in the local land office. In this way, matters resting on oral testimony are eliminated, a certainty and definiteness is given to the rights of each, the grant becomes fixed and definite, and, while as repeatedy held, the railroad company may not question the validity and propriety of the entryman's claim of record, its rights ought not to be defeated * * * by fugitive and uncertain testimony of occupation."

The railroad company acquired no interest in the land claimed by Sjoli, by reason of their application to select it made in 1885, because that appli-

cation had not been approved by the Secretay of the Interior.

This is the theory acted upon by the Land Department, when they allowed Sjoli's entry, accepted his final proof and passed his claim to patent, and it is the theory acted upon by this Court when they upheld his claim for the land.

Under the decisions hereinbefore cited, we repeat Sjoli's occupancy of his claim prior to the company's application to select it in 1885, is irrelevant and immaterial. It gave him no right as against the company since he had not then applied to enter it under any one of the public land laws, and, at the same time, the railroad company's applications made as above stated gave ~~him~~ them no right since it was not approved as required by law.

Accordingly, when Sjoli applied to enter his claim in 1889, it was in the very same condition, so far as the rights of the company were concerned, as was the land in the case at bar, when Fred Wass made his homestead application for it in 1899.

If it be said that the Secretary of the Interior never approved the company's selection of the land in the Sjoli case, we will admit that the Secretary did interpret the law correctly in awarding his claim to Sjoli, and in rejecting the company's claim therefor.

Since Sjoli had not made his application to enter the land, when the company applied to select it in 1885; under the decision in the Tarpey vs. Wadren case, Supra, it was not distinguished in

any respect from the status of the land in the Wass case, when he applied for homestead entry in 1899.

The Wass case and the Sjoli case, therefore, were both alike, and in the same status, when each of the entrymen made his application at the local land office to initiate his claim; as the Secretary's erroneous approval of the company's application to select the land in the Wass case, was a mere nullity. That is, in other words, we may say, truthfully, that the Secretary of the Interior never approved the company's application to select the land in the Wass case, as required by law. Had this Wass case received the careful attention it was entitled to, when in the Land Department for adjustment, it would have appeared, as in the Sjoli case, that a homestead right had already attached to the land, and that, therefore, it was not then subject to selection or to approval as indemnity land.

Since the Sjoli case and the Wass case are alike in all material respects, we insist that the decision in the Sjoli case should dispose of the Wass case also.

III.

The common law fiction of relation does not apply in the case at bar.

The best answer to the contention that the common law fiction of relation applies in this case, so as to make the Secretary's approval, in 1905,

relate back and make the selections valid as if the date of the applications in 1892: is found in the Sjoli case, Supra.

> "The company's unapproved selections did not, therefore, stand in the way of the lands being occupied and entered under the homestead law. On the contrary, notwithstanding the filing of such lists, they remained open, as before, to settlement, or occupancy under those laws, until the selections were formally approved by the Secretary of the Interior, and the lands withdrawn from settlement and sale."

As hereinbefore shown, the rule in the Sjoli case is announced in a number of other cases including.

Kansas Pacific R. R. Co. vs. Atchinson R. R. Co., 112 *U. S.*, 414;

United States vs. Missouri K. & T. R. R. Co., 141 *U. S.*, 358.

Oregon and California R. R. Co., vs. United States, 189 *U. S.*, 100;

Wisconsin Central Railroad Co., vs. Price Co., 133 *U. S.*, 496;

Humbird vs. Avery, 195 *U. S.*, 480;

Brandon vs. Ard, 211 *U. S.*, 11.

Directly in point, also, is the case of Flint and Pere Marquette Railway Company vs. Gordon, 41, Michigan 420, in which case Judge, Thomas M. Conley, speaking for the court, said:

> "That doctrine is remedial, and is used in the law to prevent wrong and punish trespass. As has been repeatedly declared in this Court, it can never be so applied, as to make that wrong which was innocent when done, or so

> as to divest rights, which, by sanction of law, have been acquired since the time from which the relation dates."

In construing a land grant, and in construing the homestead law, the will and intention of Congress, not common law fictions, must be kept in view.

Missouri, Kansas & Texas R. R. Co., vs. Kansas Pacific R. R. Co., 97, *U. S.*, 491.

United States vs. Southern Pacific Railroad Co., 146 *U. S.*, 570;

Wisconsin Central R. R. Co., vs. Forsyth, 159 *U. S.*, 46.

In the case of the Missouri, Kansas and Texas Company, Supra, the Court declares:

> "It is always to be borne in mind, in construing a congressional grant, that the act by which it is made, is a law as well as a conveyance, and that such effect must be given it, as will carry out the intent of congress. That intent should not be defeated by applying to the result the rules of the common law, which are properly applicable only to transfer between private parties. To the validity of such transfer it may be admitted that there must exist a present power of identification of the land, and that where no such power exists, instruments, with words of present grant, are operative, if at all, as contracts to convey, but the rules of the common law must yield in this, as in all other respects, to the legislative will."

The will of congress, then, as interpreted by the Courts, is the thing to be kept in view in determining this matter. The intent of congress, in all of its acts dealing with the public lands, has

been to give a preference right to the individual settler. This intent is seen in the preemption laws, it is seen in the homestead laws, and it is seen in each and every of the several congressional acts, granting public lands in aid of the construction of railroads.

In the preemption and in the homestead laws the intention of Congress is obvious and needs no exposition. In the railroad land grants, care has been taken to expressly except from the operation of the grant, all those tracts within the primary limits, occupied by settlers claiming under the preemption and homestead laws, prior to the definite location of the line of road.

Since Congress accepted from the operation of the grant all tracts thus occupied and claimed within the primary limits, it is reasonable to assume that they would not change the rule within the indemnity limits, where the lands were not granted to the Company.

Had it been practicable for Congress to have kept the administration of the indemnity provisions of the land grant in its own hands, there can be no doubt, that the settler upon odd numbered sections, claiming under the homestead law, prior to their selection by the Company, in the manner prescribed, would have been given, like those in the place limits, a prior right as against the Company, and it is a reasonable inference that in delegating authority to the Secretary of the Interior to

act for them, they would have him carry out their intention in that respect.

That the intention of Congress is and always has been, to give the actual settlers upon public lands a prior and superior right over other persons or parties, has been frequently declared by the Court.

In the case of *Clements vs. Warner*, 65 *U. S.*, 394, the Court said:

> "The policy of the Federal Government, in favor of settlers upon public lands, has been liberal. It recognizes their superior equity to become the purchasers of a limited extent of land comprehending their improvements, over that of any other person."

This decision rendered in the year 1861, before the enactment of the homestead law, and relating to a preemption claim, speaks of the settler's superior equity to purchase a limited extent of land as a home. But in the subsequent case of *Ard vs. Brandon*, 156 *U. S.*, 537, involving the right of a homestead entry, after declaring that the law deals tenderly, with one, who, in good faith, goes upon public land, with a view of making a home thereon, the Court adopts and incorporates, into the Ard vs. Brandon decision, the above citation from the case of Clements vs. Warner.

The case of *Clements vs. Warner* and that of *Ard vs. Brandon* are referred to approvingly by in the later case of

Northern Pacific Railroad Company vs. Amacker, 175 *U. S.*, 563, and in the case of *Tarpey vs.*

Madsen, 178 *U. S.* 214, thus showing that, after its long and varied experience in dealing with this class of cases, the Court holds as well settled, the principle that the intent of Congress is, and always has been, to give the actual settlers upon public land, in good faith, claiming for himself a home, a prior and superior right over any other person or party. And this, it seems to us, ought to settle, against the contention of the Company, their claim to the land in suit, under or by virtue of the aforesaid fiction of relation.

The case of *Shepley vs.* ~~Garran~~ Cowan, 91 *U. S.*, 330, is cited by opposing counsel as a case in point illustrating the operation of the fiction of Relation, in cases similar to the case at bar. But an examination of that case will reveal the fact (1) that the Shepley case is not similar to the case at bar, and (2) that the decision in that case rests upon the act of Congress approved March 3, 1853, 10 Stat. at L. 244, Chap. 143, rather than upon the aforesaid *fiction of relation*.

The land in question in the Shepley case was embraced in the confirmed French grant made to the Village of Carondelet before the date of the Louisana Purchase. As such confirmed French grant it was not a part of the public domain in 1835, when the individual claimant offered his preemption filing, or in 1849, when the State of Missouri selected it on account of its swamp land grant.

In 1862, this Court held the French grant invalid so far as the Shepley claim was concerned, and, owing to the facts in the case the, tract fell under the operation of the act of March 3, 1853, above cited and the relevant part of which reads as follows:

> "And provided further, that any settler who has settled or may hereafter settle on lands heretofore reserved on account of claims under French, Spanish or other grants, which have been or shall be hereafter declared by the Supreme Court of the United States, to be invalid, shall be entitled to all the rights of preemption granted by this act, and the act of fourth of September, eighteen hundred and forty one entitled 'An act to appropriate the proceeds of the public lands and to grant preemption rights,' after the lands shall have been released from reservation, in the same manner as if no reservation existed."

After the land in the Shepley claim had been released from the reservation by a decision of the Court, the heirs of Chartrand, claimed and secured the land under the act of Congress, and the fiction of relation was not needed in the decision of the case.

Selections by the state on account of its swamp land grant, the filing of a preemption statement by an individual, the making of a homestead entry by a qualified claimant, and the filing of the map of the definite location of its line of road, by a railroad company, all rest upon the same authority, an act of Congress, and all

fall under the operation of the same rule, as to the attachment of right and the vesting of title.

In neither of these cases does the attachment of right or the vesting of title depend upon the action of the Secretary of the Interior, or upon the action of any other officer of the Land Department; but the attachment of such right and the vesting of such title springs directly out of the act of Congress, in pursuance of which the claim is made, when followed up by a compliance with the provisions of such act.

In such cases the initiatory steps taken by the claimant, when followed by a compliance with the law, extends forward and requires, not a title, for the claimant has that, but record evidence of title. The only service the officers of the Land Department can render in such cases is to mark up on their records the description of such tracts of land as were designated and made certain by the state selection, the preemption filing, the homestead application, or the railroad map of definite location, and to issue as record evidence of title, such lists certificates, or patents as are usual in such cases.

What I mean to say here is that the action of the Secretary is not discretionary in any of these four cases, he has only ministerial work to perform, and his action does not relate back in any way to affect the attachment of right or the vesting of title. These are controlled exclusively by the act of Congress and the action of the claimant.

Therefore it is true that, when a state swamp

land grant selection and a preemption filing for the same tract of land are in conflict as in the case of Shepley vs. Cowan, that one which is first in time is first in right.

The act of March 3, 1853, granted the heirs of Chartrand a prior right on account of the settlement and declaration of their ancestor, in 1835. That act of Congress, and not the fiction of relation, decided the case in their favor.

In the case at bar the claim of the settler and the claim of the Company have not a common origin. The settler takes directly under the act of Congress, the homestead law, while the Company takes, if at all, under the act of the Secretary of the Interior, in pursuance of the indemnity provisions of the grant.

The settler having occupied the land and applied to enter it as a homestead in the year 1899, his right attached and his title vested as of that year, and, having been followed up with a full compliance with the law, his right and title so initiated, reaches forward and requires the issue of a patent in his favor, after the expiration of five years, unless the land was previously embraced in some superior valid claim.

The Company's unapproved selection lists is all that stood in the way of the allowance and approval of the Wass entry. As we understand the law and the ruling of the Court, the Company gained no right by merely filing its lists of applications, nor could any right attach in favor of the

Company until the lists were approved by the Secretary of the Interior.

In the case at bar the approval of the Secretary was not given until the month of February, 1905, which was more than five years after the right of the settler had attached and the title had vested in Fred Wass, under the operation of the homestead law.

If the rule "first in time, first in right," is sound in law, as argued by opposing counsel, then there can be no doubt that the settler, Fred Wass, holds the land under that rule.

It is not an answer to this to say that we are taking for granted the very point in issue, or that we are begging the question, since the rule we are contending for and relying upon here, which is that lands, within the indemnity limit, were never granted to the Company or to the state by Congress, and that the only right that can attach to such lands in favor of the Company, originates, not in the act of Congress, not in the act of the Company, but in the act of the Secretary of the Interior, has been repeatedly declared by this Court, as we understand the language of the decisions hereinbefore cited.

From all of which it appears that the case of Shepley vs. Cowan is not in point, and that the doctrine of relation cannot apply to the case at bar.

The case of *McCreery vs. Haskill*, 119, *U. S.*, 327, is also cited in support of the contention that the

doctrine of relation applies in such cases as the one at bar. But this decision was rendered under the provisions of an act of Congress approved July 23, 1866, for the quieting of land titles in California, 14 Stat. at L. 218; Section 6, of which reads as follows:

> "And be it further enacted that an act entitled "an act to provide for the survey of public lands in California, the granting of preemption rights and for other purposes" approved March 3, one thousand, eight hundred and fifty-three, shall be so construed as giving the State of California the right to select for school purposes, other lands in lieu of such sixteenth and thirty-sixth sections as were * * * covered by grants made under Spanish and Mexican authority * * * or where such sections would be so covered if the lines of the public survey were extended over such lands, which shall be determined * * * in case of Spanish or Mexican grants, when final survey of such grant shall have been made. The surveyor general for the State of California shall furnish the state authorities with lists of such sections so covered, as a basis of selection, such selection to be made from surveyed lands, and within the same land district as the section for which the selection is made."

It appeared upon the plat of the survey made under the direction of, and approved by the surveyor general for the State of California, and filed in the District Land Office at San Francisco, that section sixteen and thirty-six of the township, were embraced in the confirmed Mexican grant known as "Sausal Redondo Rancho," were set off to the grantee in pursuance to the act of Congress above

mentioned, were thus lost to the state from its grant for school purposes, and were thus officially designated as a proper basis for the selection of lieu land to the extent of these two sections.

It appears also that, after the surveyor general for the State of California, had furnished the state authorities, lists showing sections sixteen and thirty-six of the township covered by a confirmed Mexican grant, and set off to the grantee as required by law, the state, on the 22nd of April, 1868, selected, in part satisfaction of the loss in section sixteen the tract of land afterwards settled upon and claimed by McCreery under the preemption law.

The land thus selected by the state was public land, within the same land district as the section lost, and entirely free from all other claims or rights at the date of the selection as above mentioned. This selection in behalf of the state was made more than a year and a half before McCreery settled upon the land or otherwise attempted to initiate his claim thereto under the preemption law.

The right of the state to make this selection and the right of the individual to take the land under the preemption law have a common origin. They each rest upon an act of Congress and neither of them is dependent upon the action or the discretion of the Secretary of the Interior. When followed up by a compliance with the provisions of the act under which it is made the selection of the state or the filing of the individual, *whichever* is *first* in *time* is *first in right*, *reaches* forward to the ful-

fillment of the law, and requires, as a right, from the proper officers of the Land Department, record evidence of the descriptions of the land, in which their right has attached and their title vested under the act of Congress.

Wright vs. Roseberry, 121 *U. S.*, 488.

Since, then, the officers of the Land Department had no discretion to exercise in the McCreery case and rendered therein only ministerial service, it is idle to say that their action relates back in any direction, any distance, or for any purpose.

In the case at bar the settler takes under the act of Congress, the Company under that of the Secretary, and the case of McCreery is far from being in point.

Neither is the case of Campbell vs. Doe, 13 *How.*, 244, in point. In that case the Secretary of the Treasury, under whose jurisdiction such matters then were, had authorized and directed the selection of this land for school purposes, before Campbell was inadvertantly allowed to enter it. And, therefore, the selection for the state was first in time.

Other cases cited to support the fiction of relation are widely distinguished from the case at bar.

In the case of Gertgens vs. O'Connor, 191 *U. S.*, 237, the settlement of Gertgens upon the land was

made after the passage of the Act of Congress approved March 3, 1887, 24 Stat. at L. 556, and his right to a homestead entry thereon was barred by the statute, and the facts of the case, all of which were well known, or should have been well known to Gertgens when he took possession of the land in April, 1891.

In the case of the *United States vs. Anderson*, 194, *U. S.*, 394, the action was brought to recover damages for a trespass committed upon the land in question by the removal therefrom of a considerable quantity of iron ore and valuable limestone rack. And damages for tresspass in cutting and carrying away valuable timber, was the cause of the action in the case of *Musser vs. McRal*, 44 *Minn.*, 343.

Neither of the two cases last above mentioned is similar to the case at bar; and each of them is so widely distinguished from it as to need no further attention from us.

In such search as we have been able to make, we have been unable to find in the reports of this court, any case similar to the one at bar, where the land has been awarded to the Company, and the claim of the settler rejected under the operation of the fiction of relation. And, since no such case has been cited by opposing counsel, the inference is very strong, that there is no such case in the reports.

In arguing the case thus far, no attention has been given to the decisions of the United States

Land Department, for the reason that those decisions are not in harmony with the decisions of this Court; they are not always in harmony with each other, and in so far as they are in conflict with the Court decisions cited in support of this defendant's case here at bar, they are without weight and properly disregarded.

IV.

Defendant's right to possession of this land is in no way affected by the refusal of the Register and Receiver of the local United States Land Office to approve and allow application when it was prevented as aforesaid, in 1899.

Ard vs. Brandon, 156, *U. S.*, 537;
Shepley vs. Cowan, 91, *U. S.*, 330;
Frisbie vs. Whitney, 76, *U. S.*, 187;
Syttle vs. Arkansas, 9 *How.* 314.
Wirth vs. Branson, 98, *U. S.*, 118.
Stark vs. Stark, 6. *Wall.*, 402.

It appears, from an examination of the authorities cited in the foregoing pages, that the land in suit, was not granted to the Territory or to the subsequent State of Minnesota to aid in the construction of railroads or for any other purpose whatever. Nor does it appear to have been reserved for the benefit of any railroad company by the indemnity provisions of the land grant in question. It was open, therefore, to occupancy and entry under the homestead law, when Wass applied for it, at the local land office in 1899, and

the presentation of his application operated to segregate his claim from the public domian, so that, thereafter, it was not open to selection or to approval as indemnity land.

Fred Wass is claiming the land in issue, under the homestead law, and by virtue of his compliance in all respects with the provisions of the same.

His qualifications, good faith and compliance with the law are not disputed or questioned in the pleadings, but are fully admitted by the filing of a demurrer to his answer in the trial Court as exhibited in the record.

Accordingly we ask that the order and decree of the Supreme Court of the State of Minnesota be affirmed in all respects, and that the prayer of defendants in their answer made, be granted and allowed.

P. B. GORMAN,

Solicitor for Defendant in Error,

St. Cloud, Minn.

INDEX.

	PAGE
STATEMENT - - - - - - -	1
ARGUMENT:	
1. As to jurisdiction of the Court -	6
2. As to the settler's superior right to the land - - - - - -	8
3. As to the Common Law Fiction of Relation - - - - - -	21
4. As to the rejection of the settler's homestead application - -	35

No. 181.

Supreme Court of the United States

OCTOBER TERM 1910

Supreme Court U. S.
FILED
JAN 17 1911
JAMES H. McKENNEY,
Clerk

NORTHERN PACIFIC RAILWAY COMPANY

Plaintiff in Error

vs.

FRED WASS AND PAULINE WASS

Defendants in Error

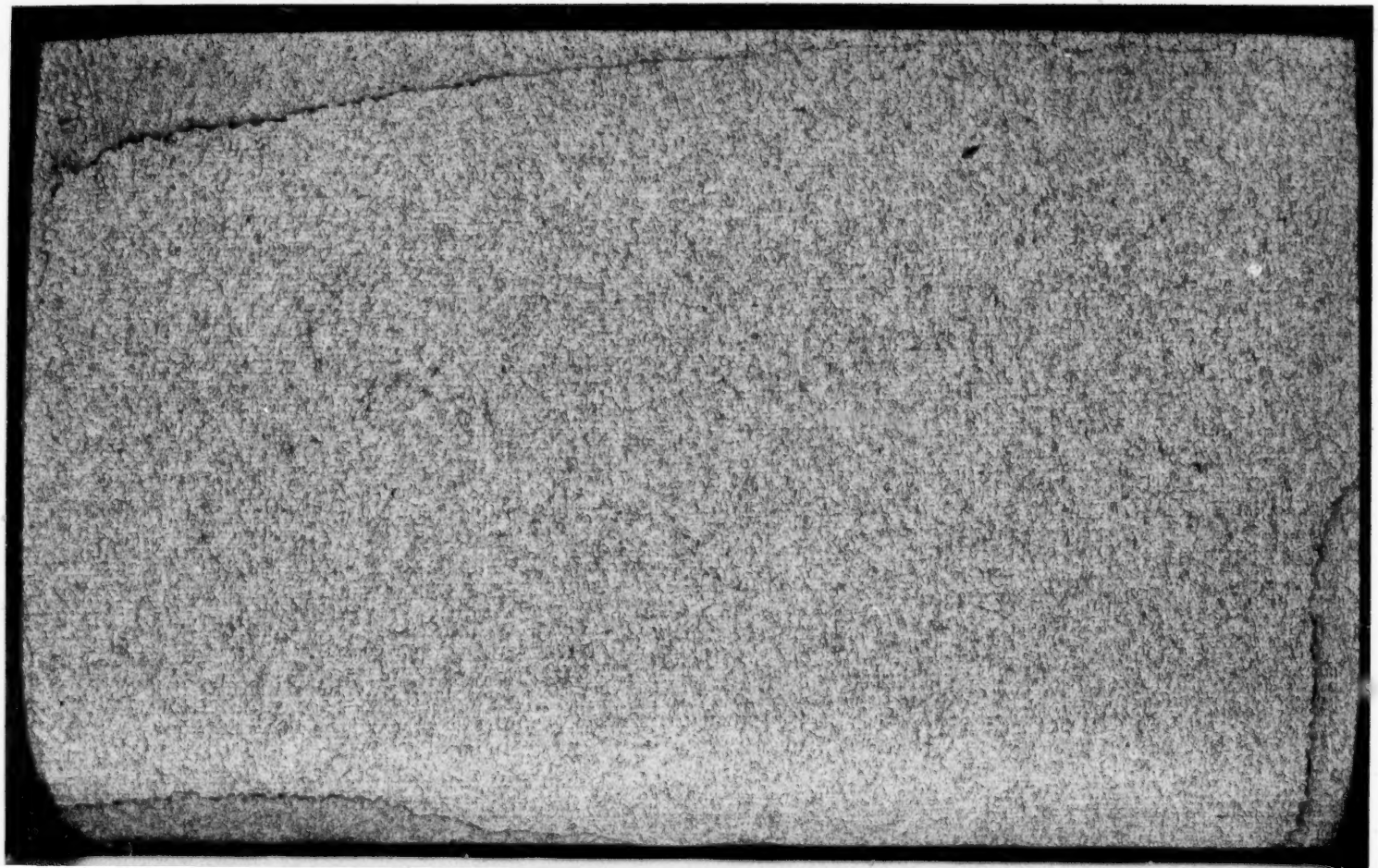
RE-ARGUMENT

BRIEF FOR DEFENDANTS IN ERROR

P. B. GORMAN

SOLICITOR FOR DEFENDANTS IN ERROR

ST. CLOUD, MINN.



SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1910.

NORTHERN PACIFIC RAILWAY COMPANY,
Plaintiff in Error.

vs.

FRED WASS AND PAULINE WASS, His Wife,
Defendants in Error.

RE-ARGUMENT.

STATEMENT.

The land, here in controversy, lies within the indemnity limits of the land grant made to the Territory of Minnesota by act of Congress approved March 3, 1857, and also within the indemnity limits of the grant made to the State of Minnesota by the act of Congress approved March 3, 1865, and is described as follows: The southeast quarter (SE¼) of section thirteen (13), township one hundred twenty-nine (129), north of range thirty-two (32) west of the fifth principal Meridian and situate in Todd County, Minn.

Twenty years after the passage of the act of Congress making this land grant, and after unsuccessful attempts to secure the building of that part of one of its branch lines of railroad, lying between Watab and Crow Wing, the said State of Minnesota, by an act of its legislature, approved

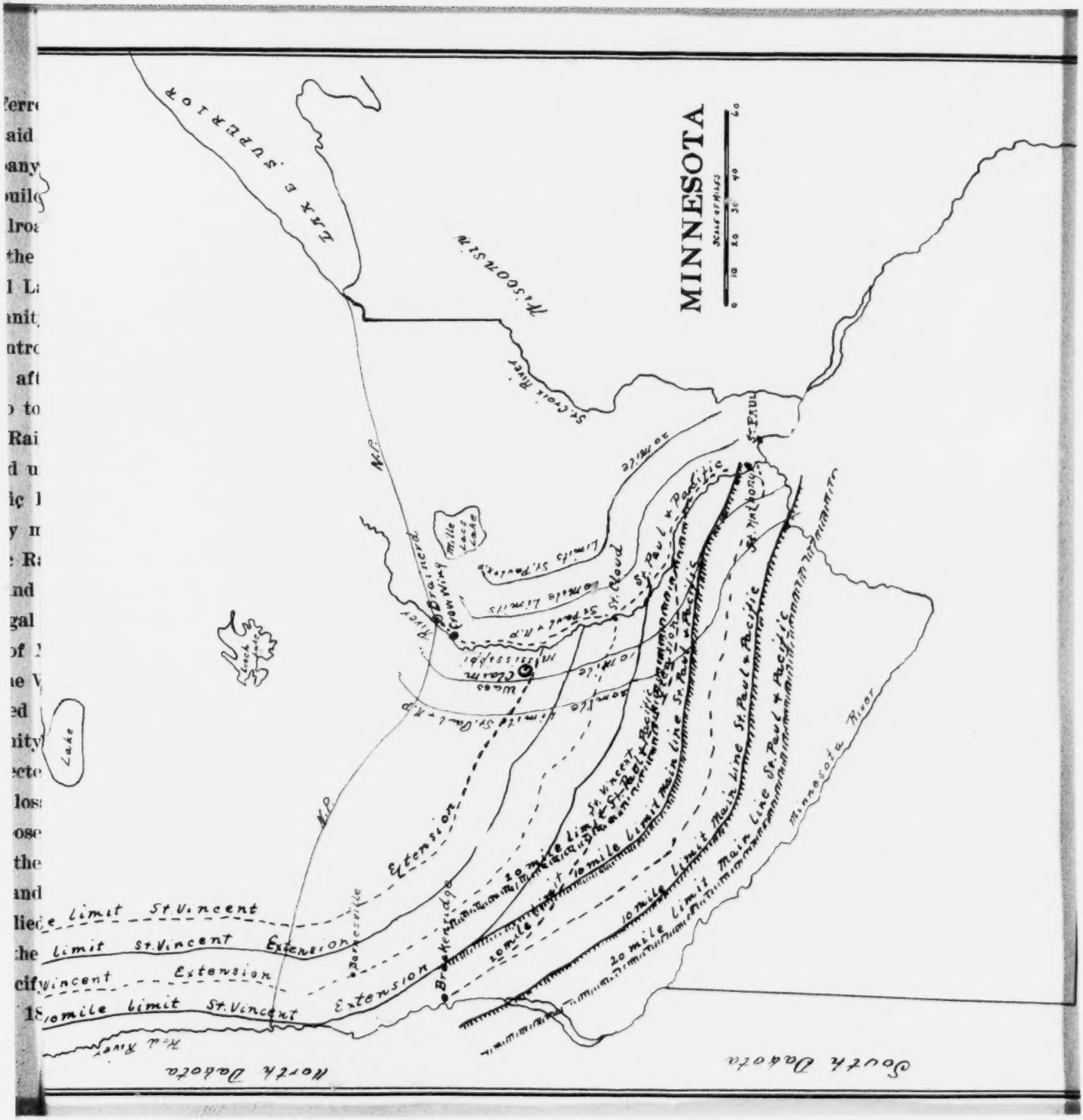
March 1, 1877, conferred all its interest and right in and to the aforesaid land grant, upon the Western Railroad Company of Minnesota, which company proceeded to build, and did build, equip, and operate a line of railroad between the points above mentioned, and, in the fall of 1877, said company filed, in the General Land office a list of applications to select indemnity land, which list embraced the tract here in controversy.

Subsequently and after the building of the line of road from Watab to Crow Wing in said state, the said Western Railroad Company of Minnesota was reorganized under the name of St. Paul and Northern Pacific Railway Company.

And thereafter by means of legal proceedings the Northern Pacific Railway Company came into possession of the land grant, here involved, and thus became the legal successor of the Western Railroad Company of Minnesota.

As stated above the Western Railroad Company of Minnesota applied to select the tract above described, as indemnity land, in the fall of 1877, but failed and neglected, at that time or at any time, to designate a loss, in its primary limits, as a basis for the purposed selection. Twelve years later, and in 1889, the same company under its new name, St. Paul and Northern Pacific Railway Company, again applied to select this tract as indemnity, but, as in the former application, failed and neglected to specify a basis for the purposed selection. February 1892 the company applied,

LAKE SUPERIOR
Rainy Lake
Lake of the Woods
Red
Lake
Leech Lake
20 mile limit St. Vincent
10 mile limit St. Vincent Extension
St. Vincent Extension
10 mile limit St. Vincent
St. Vincent
Red River
North Dakota


MINNESOTA
Lake Superior
Wisconsin
St. Croix River
Mississippi River
Minnesota River
St. Paul
Minneapolis
Duluth
St. Cloud
Brainerd
Mille Lacs Lake
Red Lake
Lake
Limits St. Paul & M.R.R.
St. Paul & Pacific
St. Vincent Extension
Extension
Main Line St. Paul & Pacific
10 mile limit
20 mile limit
North Dakota
South Dakota

a third time, to select this tract as lieu land and designated, for the first time, a basis for the selection.

Neither of the above mentioned three applications was approved by the secretary of the Interior, as required by law, or otherwise, and each and all of said applications, were invalid and without force or effect, at the time Fred Wass settled upon said land in April 1899, with the bona fide intention of entering it under the homestead law, and at the time he presented his homestead application, therefor, to the Register and Receiver of the district, wherein the land was located, in the fall of 1899.

In the spring of 1899, Defendant in error, Fred Wass, went upon the land, built a house and moved his family into it, and has remained in possession and occupancy continuously up to the present time, and he is living there now. The same summer he built a stable, dug a well, and made such other and further improvements upon the place, as were found to be necessary and convenient for a poor family just starting out on a homestead. He has added to his improvements, each year, in the way of grubbing, clearing and breaking until, at the beginning of this suit, his improvements were worth and of a value in excess of twelve hundred dollars.

In December, 1899, Mr. Wass made application at the local land office in St. Cloud, to enter the land under the provisions of the homestead law.

His application was rejected, by the local officers, and his money, tendered as fees and commissions, was refused upon the ground, that the land applied for was embraced in a then pending though unapproved indemnity selection theretofore, applied for by the St. Paul and Northern Pacific Railway Company.

Mr. Wass appealed from the ruling of the local officers and their action was approved and affirmed by the Commissioners of the General Land Office, and by the Secretary of the Interior, respectively.

In February, 1905, the Secretary of the Interior approved the application of the company to select this land, and, on the 15th day of March of the same year, a patent therefore was issued by the United States, to the State of Minnesota for the benefit of the railway company entitled thereto, and thereafter, the patent of the State of Minnesota for said land, was issued to, and in favor of, the Northern Pacific Railway Company, Plaintiff in error herein.

Wass and his family were in possession of and occupying the place as a home, at the time the patent was issued to the railway company by the State of Minnesota. The company brought an action in ejectment against Wass and his wife to oust them from possession. The case was tried in the district court of Todd County, before the court, without a jury, and judgment rendered as shows in the record (page 10 to 13) in favor of Defendants Wass and wife.

On appeal the decision of the trial court was affirmed by the supreme court of Minnesota (record page 22 to 29) and the questions involved are brought here from that court on a writ of error.

QUESTIONS INVOLVED.

The question involved in this case is, whether the right of Defendants in error in and to the land here in controversy, under the Homestead Law is superior to the Claim of Plaintiff in error, under the indemnity provisions of its Land Grant.

The trial court and the supreme court of the State of Minnesota decided that the rights of Defendants in error are superior. And, in order to maintain and uphold that decision, it will be necessary to discuss the following propositions:

1. The tract of land in issue in the Wass case was not needed to help make up the quantity of land granted to the Territory and State of Minnesota to aid in the construction of a railroad from Stillwater by way of St. Paul and St. Anthony to a point between the foot of Big Stone Lake and the mouth of Sioux Wood River, with a branch from St. Anthony, via St. Cloud and Crow Wing in said State.

2. The right of a duly qualified claimant, under the Homestead Law attaches to public land immediately and directly under the act of Congress, as soon as he has applied to enter, has settled upon, and has begun to improve the same,

without the aid of any action or thought on the part of the Secretary of the Interior.

3. The claim of a railroad company to and for lieu lands, under the indemnity provisions of their land grant does not attach immediately or directly under the act of Congress, but mediately or indirectly through and by reason of the action and judgment of the Secretary of the Interior.

4. The Secretary of the Interior, under the authority conferred upon him by the acts of Congress involved in this case can not apply a rule of law that is retroactive in its operation, so as to cut out and eliminate the rights of a homestead settler, who has resided upon, improved, and applied to enter the land before the said Secretary has approved the same to the railroad company.

5. The odd numbered sections within the indemnity limits of a railroad land grant are open to occupancy and entry under the Homestead Law, until they have been selected and approved to the company by the Secretary of the Interior in accordance with the provisions of law.

6. The Common Law Fiction of Relation does not operate to determine conflicting questions of title to real estate.

7. The rights of defendants in error in and to the land here in issue were not affected by the refusal of the Register and Receiver to approve and place their application of record, or by the failure of other officials of the land department

to correctly interpret and justly administer the law.

ARGUMENT.

A brief inspection of each of the acts of Congress having a bearing upon the status of the land, is necessary at the outset. And the first of these acts was approved March 3, 1857, (11 Stat. 195):

Be it enacted by the Senate and House of Representatives of the United States of America in Congress Assembled, That there be and is hereby granted to the Territory of Minnesota, for the purpose of aiding in the construction of railroads, from Stillwater by way of St. Paul and St. Anthony to a point between the foot of Big Stone Lake and the mouth of the Sioux Wood River, with a branch via St. Cloud and Crow Wing to the navigable waters of the Red River of the North, at such point as the Legislature may determine; * * * * every alternate section of land, designated by odd numbers, for six sections in width, on each side of said roads and branches; but in case it shall appear, that the United States have, when the lines, or routes of said roads and branches are definitely fixed, sold any sections, or any parts thereof, granted as aforesaid, or that the right of pre-emption has attached to the same, then it shall be lawful for any agent, or agents to be appointed by the Governor of said Territory or future State to select, subject to the approval of the Secretary of the Interior, from the lands of

the United States, nearest the tiers of sections above specified, so much land, in alternate sections or parts of sections as shall be equal to such lands as the United States have sold, or otherwise appropriated, or to which the right of pre-emption have attached as aforesaid: which lands thus selected in lieu of those sold, and to which pre-emption rights have attached as aforesaid together with the sections and parts of sections designated by odd numbers as aforesaid and appropriated as aforesaid) shall be held by the Territory or future State of Minnesota for the use and purpose aforesaid: Provided, That the land to be so located shall, in no case, be further than fifteen miles from the lines of said roads or branches, and selected for and on account of each of said roads or branches: Provided, further, That the lands hereby granted for and on account of said roads and branches, severally, shall be exclusively applied in the construction of that road for and on account of which such lands are hereby granted, and shall be disposed of as the work progresses and the same shall be applied to no other purposes whatsoever: And provided, further, that any and all lands heretofore reserved to the United States, by act of Congress, or in any other manner by competent authority, for the purpose of aiding in any object of internal improvement, or for any other purpose whatsoever, be and the same are

hereby reserved to the United States from the operation of this act, except so far as it may be found necessary to locate the routes of said railroads and branches through such reserved lands, in which case the right of way only shall be granted, subject to the approval of the President of the United States. * * * * *

Section 3. And be it further enacted, That the said lands heretofore granted to the Territory or future State of Minnesota shall be subject to the future disposal of the Legislature thereof for the purpose herein expressed and no other.

Section 4. And be it further enacted, That the lands hereby granted to said Territory, or future State shall be disposed of by said Territory or future State only in the manner following, that is to say: That a quantity of land not exceeding one hundred and twenty sections for each of said roads and branches, and included within a continuous length of twenty miles of each of said roads and branches may be sold; and when the Governor of said Territory or future State shall certify to the Secretary of the Interior that any twenty continuous miles of any of said roads or branches is completed, then another quantity of land hereby granted, not to exceed one hundred and twenty sections for each of such roads and branches having twenty continuous miles completed as aforesaid and included within a continuous length of twenty miles of each of such roads or branches, may be sold, and so on from time to

time until said roads and branches are completed, and, if any of said roads or branches is not completed within ten years (from the date of the approval of this act) no further sales shall be made, and the lands unsold shall revert to the United States. * * * *

The next legisiation in order of time is, "A Joint Resolution authorizing the State of Minnesota to change the line of certain branch railroads in said State and for other purposes."

Approved July 12, 1862. (12 Stat. 624.)

Whereas, by act of Congress approved March 3, 1857, there was granted to the Territory of Minnesota, lands to aid in the construction of a railroad from Stillwater by way of St. Paul and St. Anthony to a point between the foot of Big Stone Lake and the mouth of Sioux Wood River, with a branch via St. Cloud and Crow Wing to the navigable waters of the Red River of the North, the northern terminus of which was to be fixed by the legislature of said Territory at St. Vincent, and,

Whereas it is now believed that the public interests require a change of location of a part of said branch road: Therefore,

Be it resolved by the Senate and House of Representatives of the United States of America in Congress Assembled that, in lieu of that part of the railroad grant to Minnesota Territory by act of Congress approved third March eighteen hun-

dred and fifty-seven, which extends northwesterly from the intersection of the tenth standard parallel with the fourth guide meridian, there shall be granted to the State of Minnesota the alternate sections within six mile limits of such new branch line of route as the authorities of the State may designate, having its southwesterly terminus at any point on the existing line between the Falls of St. Anthony and Crow Wing, and extending in a northeasterly direction to the waters of Lake Superior, with the right of indemnity between the fifteen mile limits thereof, Provided that this resolution shall take effect from the filing in the General Land Office of the acceptance by the authorities aforesaid of such substitution, whereupon the land north of the intersection in the grant aforesaid as authorized by the said act of third March eighteen hundred and fifty-seven, being by said acceptance disencumbered of the railroad grant, shall be dealt with as other public ands of the United States.

Act of Congress Approved March 3, 1865.

An act extending the time for the completion of certain land grant railroads in the States of Minnesota and Iowa and for other purposes. (13 Stat. 526.)

Be it enacted by the Senate and House of Representatives of the United States of America, in Congress Assembled, That the quantity of lands granted to the State of Minnesota, to aid in the

construction of certain railroads in said State, as indicated in the first section of an act entitled "an act making a grant of lands to the Territory of Minnesota, in alternate sections, to aid in the construction of certain railroads in said Territory, and granting public lands, in alternate sections to the State of Alabama, to aid in the construction of a certain railroad in said State, approved March third eighteen hundred and fifty-seven, shall be increased to ten sections per mile for each of said railroads and branches, subject to any and all limitations contained in said act and subsequent acts and as hereinafter provided.

Section 2. And be it further enacted, That the first proviso, in the first section of the act aforesaid shall be so amended as to read as follows, to wit: Provided, That the land to be located shall, in no case be further than twenty miles from the line of said roads and branches, to aid in the construction of each of which said grant is made, and said lands granted shall, in all cases, be indicated by the Secretary of the Interior.

Section 3. And be it further enacted, That any and all lands heretofore reserved by the United States, by any act of Congress, or in any other manner by competent authority, for the purpose of aiding in any object of internal improvement, or other purpose whatever, be and the same are hereby reserved and excepted from the operation of this act, except so far as may be found necessary to locate the route of said road through such

reserved lands, in which case the right of way shall be granted subject to the approval of the President of the United States: Provided, further, That any lands which may have been granted to the Territory or State of Minnesota, for the purpose of aiding in the construction of any railroad, which lands may be located within the limits of this extension of said grant, or grants, shall be deducted from the full amount of lands hereby granted, and that any lands that may have been so granted shall be strictly applied in accordance with the terms and conditions of said act or acts, unless subsequently modified by law. * * * *

Section 6. And be it further enacted, That the lands hereby and heretofore granted to said Territory or State of Minnesota shall be disposed of by said State for the purposes aforesaid only and in manner following, namely: when the Governor of said State shall certify to the Secretary of the Interior that any section of any ten consecutive miles of said road is completed, in a good, substantial and workmanlike manner, as a first class railroad, and the said Secretary shall be satisfied that said State has complied in good faith with the requirements, the said Secretary of the Interior shall issue to the said state patents for all the lands granted and selected as aforesaid, not exceeding ten sections per mile, situate opposite to and within a limit of twenty miles of the line of said section of road thus completed, extending along the whole length of said complet-

ed section of ten miles of road and no further. And when the Governor of said State shall certify to the Secretary of the Interior, and the Secretary shall be satisfied that another section of said road, ten consecutive miles in extent, connecting with the preceding section or with some other first class railroad, which may be at the time in successful operation, is completed as aforesaid, the said Secretary of the Interior shall issue to the said State patents for all lands granted and situated opposite to and within the limits of twenty miles of the line of said completed section of road or roads, and extending the length of said section and no further, not exceeding ten sections of land per mile for all that part of said road then completed under the provisions of this act and the act to which this is an amendment, and so from time to time until said roads and branches are completed.

And when the Governor of said State shall so certify, and the Secretary of the Interior shall be satisfied that the whole of any one of said roads and branches is completed in a good, substantial and workmanlike manner as a first class railroad, the said Secretary of the Interior shall issue to the said State patents to all the remaining land granted for and on account of said completed roads and branches, in this act, situate within limits of twenty miles from the line thereof, throughout the entire length of said road and branches: Provided, That no land shall be granted or conveyed to said State under the provisions

of this act on account of the construction of any railroad or part thereof that has been constructed under the provisions of any other act, at the date of the passage of this act and adopted as a part of the line of railroad provided for in this act: And provided, That nothing herein contained shall interfere with any existing rights acquired under any law of Congress heretofore enacted making grants of land to the State of Minnesota to aid in the construction of railroads: And provided, further, That said lands granted by this or prior acts, shall not in any manner be disposed of, except as the same are patented under the provisions of this act, and should the State fail to complete any one of said roads or branches within eight years after the passage of this act, then the said lands undisposed of as aforesaid granted on account of said road or branches shall revert to the United States. * * * *

Section 9. And be it further enacted, That the provisions of this act shall also be construed so as to apply and extend to that portion of the line authorized to be vacated by the joint resolution approved July twelfth eighteen hundred and sixty-two, entitled: "A joint resolution authorizing the State of Minnesota to change the line of certain branch railroads in said State and for other purposes," notwithstanding the vacation thereof by said State, as though said joint resolution had not passed, and also to the line adopted by said State in lieu of the portion of the line so vacated." * * * *

Act March 3, 1871.

An act authorizing the St. Paul and Pacific Railroad Company to change its lines in consideration of a relinquishment of lands. 16 Stat. 588.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress Assembled. That the St. Paul and Pacific Railroad Company may so alter its branch lines that, instead of constructing a road from Crow Wing to St. Vincent and from St. Cloud to the waters of Lake Superior it may locate and construct in lieu thereof a line from Crow Wing to Brainerd, to intersect with the Northern Pacific Railroad and from St. Cloud to a point of intersection with a line of the original grant at or near Otter Tail or Rush Lake, so as to form a more direct route to Saint Vincent, with the same proportional grant of lands to be taken in the same manner along said altered lines as is provided for the present lines by existing law: Provided, however, that this change shall in no manner enlarge said grant, and that this act shall only take effect upon condition that proper releases shall be made to the United States by said Company of all lands along such lines from Crow Wing to St. Vincent, and from St. Cloud to Lake Superior, and that upon the execution of said releases such lands so released shall be considered as immediately restored to market without further legislation.

Approved March 3, 1871.

Act March 3, 1887.

An act to provide for the adjustment of land grants made by Congress to aid in the construction of railroads and for the forfeiture of unearned lands, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress Assembled, That the Secretary of the Interior be and is hereby authorized and directed to immediately adjust, in accordance with the decisions of the Supreme Court, each of the railroad land grants made by Congress to aid in the construction of railroads and heretofore unadjusted. * * * *

In pursuance of the directions expressed in the foregoing section one (1) of the last mentioned act of Congress, the Secretary of the Interior entered at once upon the work of adjusting the several railroad land grants still unadjusted in different parts of the country. In due course he reached the grant approved March 3, 1857, to aid in the construction of the road from Stillwater by way of St. Paul, and St. Anthony to a point between the foot of Big Stone Lake and the mouth of the Sioux Wood River, with a branch from St. Anthony via St. Cloud and Crow Wing to the navigable waters of the Red River of the North, at such point as the Legislature of said Territory might select and after some preliminary steps the Secretary of the Interior issued to the Commissioner of the General Land Office the following

letter of instructions and directions adjusting the land grant made as aforesaid for the benefit of the main line and branch railroad last above described:

UNITED STATES OF AMERICA.
DEPARTMENT OF THE INTERIOR.

Washington, D. C., Dec. 30, 1910.

PURSUANT to Section 882 of the Revised Statutes, I hereby certify that the annexed paper is a true and correct copy of the original as the same appears of record in this department.

IN TESTIMONY WHEREOF I have hereunto subscribed my name, and caused the seal of the Department of the Interior to be affixed, the day and year first above written.

(L. S.)

R. A. BALLINGER,
Secretary of the Interior.

852, '90
1516, '90
956, '91

Department Of The Interior,
Washington, D. C.,
June 10, 1891.

Address Only
The Secretary of the Interior.

St. Paul, Minneapolis & Manitoba, and the St. Paul, And Northern Pacific Railroad Companies.) Adjustment of grant.

The Commissioner of
The General Land Office.

Sir:—

With letter of January 25, 1890, was submitted by your office an adjustment of the land grant made to the then Territory of Minnesota by the act of March 3, 1857 (11 Stats., 195), and, after

the admission of the State, supplemented and amended by the Joint Resolution of July 12, 1862 (12 Stats., 624), the act of March 3, 1865 (13 Stats., 526), of March 3, 1871 (16 Stats., 588), and of June 22, 1874 (17 Stats., 203), in aid of a railroad "from Stillwater, by the way of St. Paul and St. Anthony, to a point between the foot of Big Stone Lake and the mouth of Sioux Wood River, with a branch via St. Cloud and Crow Wing to the navigable waters of the Red River of the North."

The adjustment follows the departmental decision in 8 L. D., 255, which directs that the grants for the main and branch lines of said road be adjusted as an entirety; and thus is found to be due, on account of said grants, 69,070.80 acres. With the adjustment were sent up for my approval list 10 for 56,667.10, and list 11 for 10,435.48 acres, and with a letter of February 14, 1890, was sent list 12 for 1,992.03 acres, aggregating 69,094.61 acres of land within the indemnity limits along the line of road between Watab and Crow Wing, and a slight excess over the amount shown to be due; which lists it is recommended be approved for the benefit of the St. Paul and Northern Pacific Railroad Company, the grantee of the State of Minnesota for that portion of the road.

It is stated in the letter of January 25, 1890, that the adjustment is made under the departmental decision of May 13, 1873 (Vol. 15, L. & R. p. 332), which holds that, in the matter of the conflict of lines between the St. Vincent's extension of said road and the Northern Pacific Railroad, near Glyndon, the rights of the first-mentioned company are superior to those of the latter.

Inasmuch as the Supreme Court has decided to the contrary in the recent case of the St. Paul and Pacific Railroad Company v. Northern Pacific Railroad Company (139 U. S., p. 1), it will be necessary to return said adjustment that the

same may be readjusted to accord with that decision.

In arriving at the above conclusion, the Supreme Court holds, in the decision cited, that at the date of the grant to the Northern Pacific Company in 1864, the St. Paul and Pacific Company had no grant from Crow Wing to St. Vincent, and that the grant made for this line by the act of March 3, 1865, *supra*, was a new grant, the route of which was subsequently authorized to be changed by the act of March 3, 1871, *supra*. It being thus decided by the highest judicial tribunal that the grant for the St. Vincent Extension, as it is called, is a new grant, made by acts of Congress subsequent in date to those by which the original grant was made for the main line to Breckenridge and the branch to Crow Wing, it seems that the decision of my predecessor, Secretary Vilas, in 8 L. D., *infra*, cannot be followed so far as to adjust the grant for the extension in connection with the other grants as an entirety. The earlier grants must be adjusted separately from the later one; and whenever it conflicts with the older grants, as at St. Cloud and perhaps elsewhere they will have priority of right. To this extent, I think, the decision of Secretary Vilas must be modified, and this modification would seem effectually to sever these grants as to preclude the right of indemnity selection by the older grants along the line of the younger grant, and *vice versa*.

Further than this, the rule laid down in that decision should not be disturbed; but the main line and branch as far as Crow Wing, taking their grants under the act of 1857, *supra*, should have the same adjusted as an entirety.

This ruling does not seem to be in conflict with the departmental decision in the case of the Grand Rapids and Indiana Railroad Company (10 L. D., 676), for there it was expressly held that the additional grant for the southward extension of

that road is but an amendment of the original grant; which the Supreme Court, in the case cited from 139 U. S., expressly decides the grant for the St. Vincent's Extension is not. In any event, it seems that this change is made necessary by the decision of the Supreme Court.

In your statement it is observed that the grant is charged with 28,800.65 acres of land within the primary limits as "vacant, except expired filings." Exactly what is meant by this item is not clearly understood. If the filing on said tracts expired prior to the date of definite location of the line of road, the lands should be patented to the company, unless it be shown they had not been abandoned. Northern Pacific R. R. Co., v. Stovenour, 10 L. D., 645-9. If, on the contrary it is meant that the filings existed at the date of definite location, and expired afterwards, the grant should be credited with the item, not charged therewith, and allowed indemnity for the lands thus lost. (Ib. 648.)

The charge of 14, 856.62 acres for land in the same limits, relinquished by the State, under its own act of March 1, 1877, which authorized the Governor to execute such relinquishments in favor of those who were settlers on such lands at that time, seems to be proper in aid of the adjustment of the grant.

The Supreme Court, in the case of the St. Paul Minneapolis and Manitoba Railway Company v. Greenalgh, 139 U. S., 19-22, pass upon this act, in connection with the act of Congress of March 3, 1874, *infra*, and hold that they are both valid, and that the company's contiued possession of the property, after the expiration of the time fixed for the completion of the road, was subject to the condition that the rights for settlers upon the lands at that time should not be interferred with. As the acts, last referred to, were passed and the settlements made after the definite location of the

road, it is proper to charge the lands in question to the grant, though, under the circumstances, the title to them is not to be passed to the company. This charge is a proper one, as indemnity is not to be allowed for said lands.

Deductions, aggregating 53,133.06 acres, on account of prior grants are made, under the provisions of section 3 of the act of March 3, 1865, *supra*, which provides that such deductions shall be made within the limits of the extension, and to the full quantity, of the grants made by said act. The prior grants, on account of which said deductions are made, are derived from the act of 1857, *supra*, under which several roads are entitled; and section 7 of the act of May 12, 1864 (13 Stats., 72) under which only one road is entitled, namely, the St. Paul and Sioux City, formerly the Minnesota Valley Road.

The act of 1865, *supra*, provided that the quantity of land granted to the State of Minnesota by the act of 1857, *supra*, to aid in the construction of the roads therein described, shall be increased to ten sections per mile, &c. As the construction of the St. Paul and Sioux City road was one of those provided for by the act of 1857, it might seem that road was also included in the increased grant made for all of said roads by the act of 1865. And so it would be, were it not for section 7 of the act of 1864, *supra*, which grants four additional sections per mile to that road. Congress having thereby made special provisions for said road, it is not reasonable to hold that it was intended to be also included in the general provisions of the act of 1865 nor should it be held that the latter act repealed the former by implication, when the two can thus be made to stand together. This construction is understood to be insisted upon by that company, and your adoption of it in the statement made is, I think, correct.

The correctness of the amount of some of the deductions made is questioned by the attorneys

for the St. Paul, Minneapolis and Manitoba Railway Company. Without passing upon this matter now, their brief is sent you that it may be considered in the new statement to be made.

As to the item of 2,577.27 acres described as "vacant," and that of 71,997.80 acres described as "selected," both in the granted limits it is assumed that they are composed of lands to which the grant is entitled, but are not yet in condition to be patented; otherwise the propriety of charging them against the grant for the purpose of making a final adjustment of the same, seems to be questionable and is not easily understood.

The allowance of lands to the Brainerd Branch as far north as Crow Wing, within the fifteen miles limit of the grant of 1857 and the primary limits of the Northern Pacific, under its grant of 1864, is in accordance with rulings of this department in the case of the Chicago, St. Paul, Minneapolis and Omaha Railway Company (6 L. D., 195), and of the Wisconsin Central Railroad Company in 10 L. D. 63; and of Mr. Justice Harlan in the case of the same company vs. Forsythe in 43 Federal Reporter, 867.

You state that 765.79 acres of the selected land in list 10 is covered by "old expired filings under which no one is asserting claim." It is assumed the filings expired before the selection by the company.

In the case of Allers vs. Northern Pacific Railroad Company, 9 L. D., 452, it was held (syllabus) that:

"An expired pre-emption filing, under which no claim is asserted does not exclude the land covered thereby from indemnity selection."

In the Stovenour case, before cited, it was said:

"Upon the expiration of the time limited by statute for the making of proof and payment, without such proof and payment having been made,

the presumption arose that whatever claim, or claims, had previously attached to the land, under or by reason of such filings, had been abandoned, and no longer in fact existed. This presumption, however, was not conclusive, but was open to rebuttal by any one claiming an interest in or right to the land, who might allege the contrary. The claimant, Stovenour, has made no such allegation in this case. So far as the records shows, the land in dispute was prima facie subject to the grant to the company at the date of the definite location of its road, and must be held, therefore, in the absence of any allegation or showing to the contrary, to have passed under the grant." (p. 649.)

The rule here laid down was enlarged by the requirement of notice, to the claimant, in the later case of the Little Rock and Memphis Railroad Company, 10 L. D., 595, where is was said (syllabus):

"No action should be taken on indemnity selections for land covered by expired filings until after notice to the claimants to assert any rights they may possess;"

The Allers case is not mentioned, but it is said:

"There is nothing in the Stovenour case to prevent this. While the rights under filings have ceased, settlement, if continued, would defeat the right of selection."

In the case of the Missouri, Kansas and Texas Railway Company 12 L. D., p. 88, the Little Rock and Memphis case was quoted and approved and you were directed to follow the rule there laid down.

In view, then, of these two later decisions, it is apparent that the tracts covered by expired filings ought not to have been included in the list until notice had been given "to the claimants" to assert any rights they may possess. You will therefore correct this error.

Examining the lists sent up for approval, it does not appear that the losses or selections are specified with sufficient detail to meet the requirements of the law and the rules of the Department.

The act of 1857, making the original grants to these roads, provides that where, at the time of the definite location, the United States have disposed of "any sections or any parts thereof," it shall be lawful to select in lieu thereof so much land "in alternate sections or parts of sections as shall be equal to the lands disposed of." A similar provision is found in most of the other railroad grants. The requirement of the law seems to be plain. The selection must be made tract for tract of the lost lands, not exceeding, however, in any case, an entire section. To make the selection properly in accordance with the rule, it is absolutely essential that the losses should be specified with particularity and the selections correspond therewith in quantity as nearly as legal subdivisions will permit.

If the loss is of an entire section, because, perhaps, of the swamp land grant, it will be lawful to select as indemnity therefore an entire section, or parts of a section, or sections, in one group; not exceeding in quantity the lost land. And so, in like manner, for the loss of any smaller quantity of land. Each loss, however, must be separately specified and the selection therefore designated. It is not proper to group losses on account of several claims, and make one selection to cover the lot, but the losses and seections should correspond to the extent of the claim, which caused the loss, not to exceed, however, in any specification of loss or selection of indemnity, the amount of one section. With lists thus prepared, I think the law and rules of the Department will be sufficiently complied with.

Herewith are returned said lists, and are also

sent the arguments of counsel filed in relation thereto.

Very respectfully,
(Signed) Geo. Chandler,
Acting Secretary.

After this letter of instructions had reached the Commissioner of the General Land Office, The St. Paul, Minneapolis and Manitoba Railway Company and the St. Paul and Northern Pacific Railway Company both requested a suspension of action, and that they be given an opportunity to be heard in oral argument against the principle and rules of adjustment laid down in the foregoing letter. The companies' request was granted and, in July, following briefs were filed and oral arguments before the said Secretary were made by counsel in behalf of each of said roads.

The Secretary took the whole matter under further advisement, with the aid of the briefs and the oral arguments made by counsel as aforesaid, and thereafter on October first, 1891, issued the following letter to the Commissioner of the General Land Office adhering to the rules and directions laid down in his letter of June 10, 1891.

SYLLABUS.

Letter of October, 1891.

In view of the provisions of the act of March 3, 1887, requiring the adjustment of railroad grants in accordance with decisions of the Supreme Court, and the recent decision of said Court as to the relation of the act of March 3, 1871, to the acts of

1857 and 1865, the Department must recede from its former ruling with respect to the adjustment of the Manitoba grant as an entirety.

The grant of the St. Vincent Extension of the St. Paul, Minneapolis and Manitoba Railway is a new grant made by act of Congress subsequent in date to those by which the original grant was made for the main line, and it, therefore follows that the grant for said extension should not be adjusted in connection with the other grants as an entirety. The earlier grants must be adjusted separately from the later, and wherever the latter conflict with the older grant, priority of right must be accorded the prior grant.

The separate adjustment of the grants for the main and branch lines precludes the right of indemnity selection by the older grant along the line of the younger and vice versa.

The Department adheres to its ruling of June 10, 1891, and modifies the departmental decision in the case of the St. Paul, Minneapolis and Manitoba Railway Company (reported) 8 L. D., 255.

Secretary Noble to the Commissioner of the General Land Office Oct. 1, 1891. 13 L. D. 353.

"With your letter of January 25, 1890, was forwarded for my approval certain indemnity lists of selections by the St. Paul and Northern Pacific Railway Company and in said letter was presented an adjustment of the grants made by acts of March 3, 1857 (11 Stat. 195); March 3, 1865 (13 Stat. 526) and March 3, 1871, (16 Stat. 588) to the Territory and State of Minnesota to aid in the construction of a railroad "from Stillwater by way of St. Paul and St. Anthony, to a point between the foot of Big Stone Lake and the mouth of Sioux Wood River, with a branch via St. Cloud and

Crow Wing to the navigable waters of the Red River of the North." This adjustment proceeding under departmental decision 8 L. D. 255, recognized the grant of the main and branch lines of the Manitoba road as an entirety.

Subsequent to your letter, towit: March 2, 1891, the Supreme Court handed down an opinion in the case of the St. Paul and Pacific Railroad Company, vs. Northern Pacific Railroad Company (139 U. S. 1.) in which the grants under consideration were discussed, and in applying that decision to the adjustment it was held by me June 10, 1891: "It being thus decided by the highest judicial tribunal that the grant for the St. Vincent extension, as it is called, is a new grant made by act of Congress subsequent in date to those by which the original grant was made for the main line to Breckenridge and the branch to Crow Wing, it seems that the decision of my predecessor, Secretary Vilas, in 8 L. D., infra, cannot be followed so far as to adjust the grant for the extension in connection with the other grants as an entirety. The earlier grants must be adjusted separately from the later one; and whenever it conflicts with the older grants, as at St. Cloud and perhaps elsewhere, they will have priority of right. To this extent I think, the decision of Secretary Vilas must be modified and this modification would so effectually sever these grants as to preclude the right of indemnity selection by the older grants along the line of the younger and vice versa.

It was for the review in this, in the matter of the adjustment of its grant, that the Manitoba company requested a suspension of action thereunder, and that an opportunity be afforded it to present the matter orally, which was granted, the case being heard July 15, last.

A brief history of these grants is necessary to a proper understanding of the Matter now under consideration. The grant made by the act of March 3, (supra) was for a main line from Stillwater to a point between the foot of Big Stone Lake and the mouth of Sioux Wood River, with a branch via St. Cloud and Crow Wing to St. Vincent, and was conferred upon the Minnesota and Pacific Railroad Company. In November, 1857, the Company located the branch line as far as Crow Wing, and in March, 1862, the State transferred the grant to the St. Paul and Pacific Railroad Company.

By joint resolution of July 12, 1862 (12 Stat. 624) a grant was made to the State of Minnesota for a new branch line having its southwestern terminous at any point on the existing line between the Falls of St. Anthony and Crow Wing and extending in a northeasterly direction to the waters of Lake Superior in lieu of that part of the original branch line, extending northwesterly from the intersection of the tenth (10) standard parallel with the fourth guide meridian.

By the ninth (9) section of act of March 3, 1865, (supra) which increased the grant made by act of

March 3, 1857 (Supra), from six alternate sections per mile on each side of the roads and branches to ten sections per mile, provision was made that said act should be so construed as to apply and extend to that part of the line authorized to be vacated by the joint resolution of July 12, 1862, (supra) as though said resolution had not been passed, and also to the line adopted by the state in lieu of that portion of the line vacated.

We now have two branch lines, one from St. Cloud via Crow Wing to St. Vincent, and another from some point on the line between the Falls of St. Anthony and Crow Wing to Lake Superior. By the act of March 3, 1871, (supra) the St. Paul and Pacific Railroad Company was authorized to alter its branch lines so that instead of constructing a road from Crow Wing to St. Vincent and from St. Cloud to the waters of Lake Superior, it might locate and construct in lieu thereof a line from Crow Wing to Brainerd to connect with the Northern Pacific Railroad, and from St. Cloud to a point of intersection with the line of the original grant at or near Otter Tail, or Rush Lake, so as to form a more direct route to St. Vincent, with the same proportional grant of lands to be taken in the same manner along said altered lines, as provided for the present lines by existing laws." Provision was also made for a relinquishment by the company of all lands along the abandoned lines from Crow Wing to St. Vincent and from St. Cloud to Lake Superior.

After the passage of this act there were yet two branch lines, the first comprising that portion of the original branch line as far north as Crow Wing with the extension authorized by this act to Brainerd; and the second, being an entire new line terminating as intended the original line should, at St. Vincent.

Of these the Manitoba Company claims the grant appertaining to the portion the first south of Watab and the entire new line to St. Vincent, while the St. Paul and Northern Pacific Company claims the grant for the line between Watab and Brainerd. Locations were made, under the act of March 3, 1871, which were accepted, and the roads have been constructed practically upon said lines.

It is now urged that in view of the decision of Secretary Chandler, in which it was held that under the act of March 3, 1857, the main and branch line were considered as one and the same road, and that the act of March 3, 1871, was an amendment of the act of March 3, 1857, and should be construed as though it were inserted in it, which decision was reaffirmed by Secretary Vilas, February 26, 1889 (8 L. D., 258), and declared to become a rule of property, it ought and cannot be overruled, unless very clearly shown to be wrong; further, that all that was meant by the court, in the case referred to, was that in respect to the time, when the grant of 1871 was to take effect as against an adverse railroad grant.

In answer to the first proposition, I have but to

refer to the act of March 3, 1887 (24 Stat. 556), which directs an immediate adjustment in accordance with the decisions of the Supreme Court, of all railroad land grants made by Congress, then unadjusted. There can be no question but that these grants came under that act, and it is but necessary to consider whether, under the decisions of the court, these grants are to be considered and adjusted as one or as separate grants.

In the case before referred to, the St. Paul and Pacific Railroad Company contended that the acts of March 3, 1865, and March 3, 1871, are to be treated, not as distinct acts, but simply as amendments to the act of March 3, 1857.

In answer to such contention the Court says: "The act of 1871 does not purport, in any sense to be an amendment of the act of 1857. It simply authorizes the St. Paul and Pacific Railroad Company to change its lines, in consideration of the relinquishment of certain lands. The old lines were to be given up and all the benefits attached to them, in consideration of which new lines were authorized, the old lines were not amended, but were abandoned. There was no partial release of the accompanying grants, but whatever right attended the original lines were to be surrendered." This language is very plain and cannot be misunderstood.

In the argument, both oral and by brief, counsel for these companies lay particular stress upon certain words used in the acts of 1871, viz: "may

alter its branch lines ****** with the same proportional grant of lands to be taken in the same manner along said altered lines as is provided for the present lines by existing laws. It is urged that lands are taken in the same manner as was provided by the then existing laws, when they are taken under and according to the conditions and limitations of the acts of 1857 and 1865, and that the altered ines consist of the portions located in pursuance of the act of 1871, together with the portions of the line originally contemplated, which were not affected by the alteration; hence it follows that they are taken along the altered lines, when they are taken anywhere along the line as finally located pursuant to the provisions of the acts of 1857, 1865 and 1871. This contention can not be sustained, in the light of the decision above referred to.

It will be remembered that the grant made by the acts of 1857 and 1865 were to the Territory and State of Minnesota and that lands were only to be disposed of in the manner as therein provided, under the direction of the State, who was to see that they were applied for the purpose intended. The act of 1865 provided for an issue of patents to the state as the road was constructed applying the coterminus principle.

The act of 1871 recognized the action of the State in confirming the grant upon the St. Paul and Pacific Company, and authorized the company to alter its lines, but that the grant for such altered

lines, (for which no previous grant had been made) was to be taken in the same manner as though the company had built and earned the grants for existing lines i. e. through the state and as the roads were constructed recognizing the coterminus principle. The amount of the grant was fixed by the words: "The same proportional grant of lands" and they were to be taken where? Along the altered lines i. e. the new or changed lines.

I am clearly of the opinion that the directions heretofore given for the adjustment of these grants and embodied in my letter to you of June tenth (10) last are correct and I have therefore to direct that you proceed without delay in this matter, as great interests are involved and demand immediate action.

Other questions are attempted to be raised by the St. Paul and Northern Pacific Company in the matter of certain deductions made in the adjustment before submitted by your office, but I prefer to leave same until the matter is again presented in accordance with directions herein given.

The Adjustment considered in the foregoing letters of June 10, and October 1, 1891, was made and completed in due course, under and in pursuance of the provisions of the act of Congress approved March 3, 1887, and in accordance with the decisions of the Supreme Court as in said act of Congress provided.

Neither the tract of land embraced in the Wass

claim, nor any of the odd numbered sections, within the indemnity limits of this branch line, applied for by the company in 1877, 1889 and in 1892, as before stated, was included in the lands awarded to the state for the benefit of the company entitled thereto, in the adjustment considered in the above letters of the Secretary of the Interior, for the reason that the State had, theretofore received patents for the full amount of lands granted in aid of the construction of the main line from Stillwater to Breckenridge, with its branch from St. Anthony to Crow Wing, the grant for which main line and branch were adjusted as an entirety.

The State was expressly inhibited from applying this grant or any part thereof to any other purpose, whatsoever, it is clear that when ten sections per mile, for the total mileage of the main line and branch, had been patented to the state for and on account of these lines, no more lands could be allowed in the adjustment. Hence all the odd numbered sections within the indemnity limits of this grant, south of Crow Wing, including the tract in the Wass claim, were properly excluded from the lists of lands awarded to the state for the benefit of the railroad company in the adjustment made as aforesaid.

As the odd numbered sections in the indemnity limits of this grant south of Crow Wing, including the Wass claim, were not in the aforesaid adjustment, awarded to the state for the benefit of such company as might be found to be entitled to them:

they were, intentionally excluded from such lists, and this exclusion from these lists was, in fact a rejection of the company's claim for the same, in their applications to select made in 1877, 1889 and in 1892 as aforesaid.

By this adjustment, therefore, the lands in question here, were disencumbered of any and all claims that might otherwise be made for them by the state or by any railroad company claiming under the state.

The tracts of land here in controversy, were in this disencumbered condition in 1899, when defendants settled upon, took possession of and applied to enter the same under the homestead law, as hereinbefore explained.

Subsequently and in February, 1903, the Department, at the solicitation of Plaintiff herein, took up the matter of this adjustment again; and in a decision reported in 32 Land Decisions, page 21, held that the former adjustment, made as aforesaid, in 1891, was erroneous in this respect; that the Department in making the adjustment in 1891, held that the branch line known as the St. Vincent Extension, as shown on the diagram opposite page two of this brief, was constructed under the provisions of a new grant rather than under the provisions of an amendment to the grant of March 3, 1857.

Upon this ground the former adjustment by Secretary Noble in his letter of June 10, 1891, and that of October 1 of the same year, reported in

13, L. D., 353, was recalled, reconsidered and so modified as to hold that the act of March 3, 1871, is an amendement of the act of 1857, and that the grant for the said St. Vincent Extension should be adjusted with the grant of 1857 as an entirety.

Owing to the reservations along the line of the St. Vincent Extension made in prior grants, for the benefit of other railroads, there seems not to have been land enough left within the primary limits and within the indemnity limits to supply the ten sections per mile which the company claimed under the grant of 1871. By being allowed to adjust as an entirety with the older lines to Breckenridge and to Crow Wing, this St. Vincent extension would absorb a large quantity of the lands patented to the state for the benefit of the older line and branch, and thus leave them enough short of the quantity granted, to enable the interested parties to still claim all the odd numbered sections along the branch line between Crow Wing and St. Cloud.

In their desire to get these remaining lands along the Crow Wing branch the railroad company overlooks, or ignores, the fact that all of the lands along the St. Vincent Extension, covered by former grants, were excepted from the operation of the grant of March 3, 1871, and that the company was not entitled to indemnity for lands covered by prior grants, or for lands not in place within their granted limits.

As to whether or not the act of March 3, 1871,

is a new and independent grant or merely an amendment of the act of March 3, 1857, has been considered by this Court in the case of St. Paul and Pacific Railroad Company vs. Northern Pacific Railroad Company reported in 139 U. S. 1, and in an exhaustive opinion handed down by Mr. Justice Field, in March, 1891, the act of March 3, 1871, is held to be a new grant subsequent in date to July 2, 1864, and therefore, subsequent to March 3, 1857.

In the opinion referred to 139 U. S. 1, Justice Field says:

> "The act of March 3, 1865, as said above, is a new Grant, referring to but distinguishable and distinct from, that made by act of March 3, 1857. The act of March 3, 1871, only authorizes the construction of different lines from those previously designated, in consideration of the relinquishment of lands along the previously designated lines, the new lines to have the same proportional grant along them to be taken in the same manner as along the former lines. These two acts are subsequent in date to the act under which the plaintiff claims, and the rule has long been settled that where different grants cover the same premises the earlier takes the title. There would be no reason why that rule should not be followed in the present case, if the act of March 3, 1871, should be held to cover the premises in controversy.
>
> "It is, however, contended in answer to this position of an earlier grant to the plaintiff, that the acts of March 3 1865, and March 3, 1871, are to be treated, not as distinct acts, but simply as amendments to the act of March 3,

1857, and to be given operation as of that date. We do not assent to this position. Though the act of March 3, 1865, by its new and additional grants amended, the previous act of 1857, its operation upon any lands previously reserved to aid in any work of internal improvement was expressly restrained. What was reserved before remained reserved afterwards. And the act of 1871 does not purport, in any sense, to be an amendment of the act of 1857. It simply authorizes the St. Paul and Pacific Railroad Company to change its lines in consideration of the relinquishment of certain lands. The old lines were to be given up, and all the benefits attached thereto, in consideration of which new lines were authorized The old lines were not amended, but were abandoned. There was no partial release of the accompanying grants, but whatever rights attended the original lines were to be surrendered."

The adjustment of these several grants made by the department, as above stated in 1891, seems to be fully supported by this decision above cited, and should not be disturbed except for the strongest and clearest reasons.

In the subsequent adjustment made by the Department in February, 1903, we find no authority cited except the decision of Secretary Vilas, rendered in 1889, some two years before this Court handed down the decision above cited in 139 U. S. 1. And the Vilas ruling could not be considered authority after this Court had decided the same point otherwise. Therefore the latter adjustment seems to have been made without authority of law. Neither can we discover any reason for this later

adjustment other than that the Department believed that the Court did not mean what its language clearly expressed, when it says that the act of 1871 is not an amendment, but is a new grant.

I can not hope to add anything to what has been said by the Court and by Secretary Noble on the points in issue here, and in leaving this phase of the question we ask the attention of the Court especially to the

Two letters of Secretary Noble herein quoted, the one of June 10, is certified because it was not published in the reports, and the other of October 1, 1891, is reported in 13, Land Decisions, 353.,

Also to the letter of Secretary Hitchcock of date February 1903, and published in Land Decisions 32, page 21.

And to the decision of this Court above referred, 139, U. S. 1.

We believe that the best evidence in support of our views, in this matter, is to be found in reported decisions heretofore rendered by this Court, and, therefore, we beg leave, at this time, to quote from a few leading cases in point.

The Court said: In the case of *Ryan vs. Central Pacific Railroad Company; 99 U. S. 382; Decided* 1879:

> "Under the statute when the road was located and the maps were made, the right of the Company to the odd sections first named became, ipso facto, fixed and absolute. With respect to the "lieu lands, as they are called, the *right was only a float* and *attached* to *no*

particular tracts, until the selections were actually made *in the manner prescribed.*

In the case of *Cedar Rapids, etc., Railroad Company vs. Herring* 110 *U. S.* 27. Decided in 1884.

> "It is obvious, however, that the right to these odd sections and the right to others, in lieu of such odd sections as have been previously disposed of, depend on very different circumstances, and it is not easy to see how rights could be vested in any particular section or sections of the latter class, until it is ascertained how many of the original odd numbered sections are thus lost, and until the grantee has exercised his right of selection. The latter unlike the odd numbers, within the six mile limit, are not ascertained and made specific by the protraction of the established line through the map of the public lands. They are not and cannot be made specific until the grantee's right of selection has been exercised. This Court, in construing the same clause of the grant to the California and Oregon Railroad Company 14 Statute at Large 239 said: "When the road was located and the maps were made the right of the Company to the odd sections first named became fixed and absolute. With respect to the "lieu lands," as they are called, the right was only a float, and attached to no particular tracts, until the selection was made *in the manner prescribed.*"

Kansas Pacific Railroad Company vs. Atchinson, Topeka and Sante Fe Railroad Company. 112 *U. S.* 414, decided in 1884:

> "The question, therefore, for determination is, whether the grant to Kansas by Act of Congress of March 3, 1863, covered the title to these idemnity lands. We are clear that it did not. It granted only alternate sections

designated by odd numbers, within the limit of ten miles, and from them certain portions were to be excepted. For what were thus excepted, other lands, were to be selected from adjacent lands, if any there remained to which no other valid claims originated. But what unappropriated lands would thus be found and selected could not be known before actual selection. A right to select them within certain limits, in case of a deficiency within the ten mile limit, was alone conferred, not a right to any specific land, or lands capable of identification by any principle of law or rules of measurement; neither locality nor quantity is given from which such lands could be ascertained. If, therefore, when such selections were to be made, the land from which the deficiency was to be supplied had been appropriated by Congress to other purposes, the right of selection became a barren right, for until selection was made the title remained in the government subject to be disposed of at its pleasure."

St. Paul and Sioux City Railroad Company vs. Winona and St. Peter Railroad Company 112 *U. S.* 720 decided in 1884:

"The reason for this is that no vested right can attach to land in place, the odd numbered sections within six miles of each side of the road, until these sections are ascertained and identified by a legal location of the line of road, so in regard to the lands to be selected within a still larger limit, their identification can not be known until the selection is made. It may be a long time after the line of road is located before it is ascertained how many sections or parts of sections within the primary limits have been lost by sale or pre-emption. It may be still longer before selection is made

to supply the loss. The plaintiff in error insists, that the map of its line of road was filed in 1859. The Court of original jurisdiction finds that up to the time of trial in October, 1878, a period of nearly twenty years, no selection of these lands had ever been made by the company or by anyone for it. Was there a vested right in this company during all of this time to have not only these lands, but all the odd numbered sections within the twenty mile limit, on each side of the line of road await its pleasure? Had the settlers in that populous region no right to buy of the government, because the company might choose to take them, or might after all that delay, find out that they were necessary to make up deficiencies in other quarters? How long were such lands to be withheld from market, and withdrawn from taxation and forbidden to cultivation?"

Barney vs. Winona and St. Peter Railroad Company, 117 *U. S.*, 228., *Decided* 1886.

"In the construction of land grant acts in aid of railroads, there is a well established distinction observed between "granted lands" and "indemnity lands." The former are those falling within the limits especially designated and the title in which attaches, when the lands are located by an approved and accepted survey of the line of the road, filed in the Land Department, as of the date of the act of Congress. The latter are those lands selected in lieu of parcels lost by previous dispositions and reservation for other purposes and the title of which accures only from the time of their selection."

Sioux City and St. Paul Railroad Company vs. Chicago, Milwaukee and St. Paul Railway Company, 117 *U. S.*, 406, *Decided* 1886:

"In the opinion above referred to it was held that while this rule applied to what are called lands in place, that is, those odd sections found within ten miles limit of the road, as those ten miles conflict with each other, it did not apply to lieu lands or indemnity lands which were to be selected outside of the ten mile limit. The reason of this was said to be that, with regard to the odd sections found within the original limits of the grant undisposed of when the line of road was definitely located, that location ascertained the sections which passed by the grant and fixed the right to such sections whether it was the whole or the moiety of them. But no title to indemnity lands was vested until a selection was made by which they were pointed out and ascertained and the selection made, approved by the Secretary of the Interior."

Wisconsin Central Railroad Company vs. Price County et al, 133 *U. S.* 496, decided 1890

"But as to the remainder of the lands taxed, which fell within the indemnity limits, the case is different. For such lands no title could pass to the company, not only until the selections were made by the agents of the state appointed by the Governor, but until such selections were approved by the Secretary of the Interior. But that officer never approved of them, nor can such approval be inferred from his not formally rejecting them. "The approval of the Secretary was essential to the efficacy of the selections and to give to the company any title to the land selected. His action in that matter was not ministerial but judicial. He was required to determine, in the first place, whether there were any deficiences in the land granted to the company, which were to be supplied from indemnity

lands, and, in the second place, whether the particular lands selected could be properly taken for those deficiences. In order to reach a proper conclusion on these two questions he had also to inquire and determine whether any lands in the place limits had been previously disposed of by the government, or whether any pre-emption or homestead right had attached before the line of the road was definitely fixed. There could be no idemnity unless a loss was established. And in determining whether a particular selection could be taken as indemnity for the losses sustained, he was obliged to inquire into the condition of those indemnity lands and determine whether or not any portion of them had been appropriated for any other purpose, and if so, what portion had been thus appropriated and what portion still remained. "Until the selections were approved, there were no selections, in fact, only preliminary proceedings taken for that purpose, and the indemnity lands remained unaffected in their title. Until then the lands which might have been taken as indemnity were incapable of identification, the proposed selections remained the property of the United States.

The government was indeed, under promise to give the company indemnity lands in lieu what might be lost by the cases mentioned. But such promise passed no title, and, until it was executed, created no legal interest that could be enforced in the courts."

After referring to some former decisions involving indemnity land questions, the court concludes this Wisconsin Central case by saying:

"THE UNIFORM LANGUAGE IS, THAT NO INDEMNITY LANDS BECOME VES-

TED IN ANY COMPANY OR IN THE STATE UNTIL THE SELECTIONS ARE MADE; AND THEY ARE NOT CONSIDERED AS MADE UNTIL THEY HAVE BEEN APPROVED, AS PROVIDED BY STATUTE, BY THE SECRETARY OF THE INTERIOR."

United States vs. Missouri, Kansas and Texas Railway Company, 141 *U. S.* 358, decided 1891:

> "We say prior to such selection and approval, because as to lands which may be legally taken for purposes of indemnity, the principle is firmly established that title to them does not vest in the railroad company, for the benefit of which they are contingently granted, but in the fullest legal sense remains in the United States until they are actually selected and set apart, under the direction of the Secretary of the Interior especially for indemnity purposes.

New Orleans Pacific Railway Company vs. Parker 143 *U. S.* 42, decided 1892:

> "Now it has long been settled that while a railroad company, after its definite location acquires an interest in the odd numbered sectoins within its place or granted limits, which interest relates back to the granting act, the rule is otherwise as to the lands within the indemnity limits. As to lands of the latter class, the company acquires no interest in any specific section until a selection is made with the approval of the Land Department.
>
> "Having regard to the adjudicatal cases it is to be taken as established that unless otherwise expressly declared by congress, no right of the railroad company attaches or can attach to specific lands within indemnity limits until there is a selection under the direction of the Secretary of the Interior."

Humbird vs. Avery, 195 *U. S.* 480, Decided 1904:

"This conclusion is fortified, if not absolutely demanded by another consideration, namely, that no title to indemnity lands is vested until a selection be made by which they are definitely ascertained and the selection made approved by the Secretary of the Interior. This principle is firmly established. A full statement of it is found in the *Wisconsin Central Railroad Company vs. Price County*, 133 *U. S.* 496.

Sjoli vs. Dreschel, 199 *U. S.*, 564, decided 1905.

"That the railroad company will not acquire a vested interest in particular lands, within or without the place limits, merely by filing a map of general route and having it approved by the Secretary of the Interior, although, upon the definite location of its line of road, and the filing and acceptance of a map thereof in the office of the Commissioner of the General Land Office, the lands within the primary, or place limits not theretofore reserved, sold, granted or otherwise disposed of, and free from pre-emption or other claims or rights, became segregated from the public domain, and no rights in such place lands will attach in favor of a settler or occupant, who became such after definite location;

"That no rights to lands within indemnity limits will attach in favor of the railroad company until after selection made by it with the approval of the Secretary of the Interior."

"That up to the time such approval is given, lands within indemnity limits, although embraced by the company's list of selections, are subject to be disposed of by the United States, or to be settled upon and occupied under the pre-emption and homestead laws of the United States," and

"That the Secretary of the Interior has no authority to withdraw from sale or settlement lands that are within indemnity limits, which have not been previously selected, with his approval to supply deficiencies within the place limits of the company's road." * * *

"The company's unapproved selections did not therefore, stand in the way of the lands being occupied and entered under the homestead laws. The mere filing of its lists of selections of indemnity lands did not have the effect to exclude them from occupancy under the pre-emption and homestead laws. On the contrary, notwithstanding the filing of such lists, they remain open as before, to settlement or occupancy under those laws until the seleections were formally *approved* by the Secselections were formally approved by the Secretary of the Interior and the lands withdrawn from settlement or sale."

In the late case of *Brandon vs. Ard*, 211 *US*. 11, decided in 1908, after reviewing the facts of the case, the court refers to, quotes from at length, and follows, as the law of the case, the doctrine announced in the Sjoli case, thus saying to the profession and to the public, that the rules laid down in that case were general in their application, wherever there are conflicting claims between an individual entryman and a railroad company for lands within its indemnity limits.

On the authority of all these cases hereinbefore referred to we assert that the rule laid down so clearly in the Sjoli case, also governs and disposes of the case at bar.

It is irrelevant that Sjoli settled upon his claim

in 1884, and prior to the company's application to select it, in 1885, since he did not apply to enter it as a homestead or otherwise, until 1889, four years after the company's application.

It is well settled that an individual entryman acquires no interest in lands as against a railroad company by mere occupancy, or until he has made application to the proper local land office to enter his claim under some one or other of the public land laws.

Kansas Pacific Railroad Company vs. Dunmeyer, 113 *U. S.*, 629;

Hastings and Dakota Railroad Company vs. Whitney, 132 *U. S.*, 357;

Whitney vs. Taylor, 158 *U. S.*, 85;

Northern Pacific Railroad vs Colburn, 164 *U. S.*, 383;

Northern Pacific Railroad Company vs Sanders, 166 *U. S.*, 620;

Tarpey vs. Madsen, 178 *U. S.*, 214.

In the Tarpey case last above cited, the Court says:

> "Oral evidence, therefore, of the date of occupancy, may be decisive of the controversy between such individual applicants for a tract of public land, but by decisions of this Court running back to 1882, as between a railroad company holding a land grant and an individual entryman, the question of right has been declared to rest, not on the mere matter of occupancy, but upon the state of the record."
>
> "Recapitulating, we are of opinion that a

> proper interpretation of the acts of congress making railroad grants like the one in question, requires that the relative rights of the company and an individual entryman must be determined, not by the act of the company in itself, fixing definitely the line of its road, or by the mere occupancy of the individual, but by record evidence on the one part, the filing of the map in the office of the Secretary of the Interior, and, on the other the declaration and entry in the local land office. In this way, matters resting on oral testimony are eliminated, a certainty and definiteness is given to the rights of each, the grant becomes fixed and definite, and, while as repeatedly held, the railroad company may not question the validity and propriety of the entryman's claim of record, its rights ought not to be defeated * * * by fugitive and uncertain testimony of occupation."

The railroad company acquired no interest in the land claimed by Sjoli, by reason of their application to select it made in 1885, because that application had not been approved by the Secretary of the Interior.

This is the theory acted upon by the Land Department, when they allowed Sjoli's entry accepted his final proof and passed his claim to patent, and it is the theory acted upon by this Court when they upheld his claim for the land.

Under the decisions hereinbefore cited, we repeat Sjoli's occupancy of his claim prior to the company's application to select it in 1885, is irrelevant and immaterial. It gave him no right as against the company since he had not then applied to enter it under any one of the public land laws,

and, at the same time, the railroad company's applications made as above stated gave them no right since it was not approved as required by law.

Accordingly, when Sjoli applied to enter his claim in 1889, it was in the very same condition, so far as the rights of the company were concerned, as was the land in the case at bar, when Fred Wass made his homestead application for it in 1899.

If it be said that the Secretary of the Interior never approved the Wass application to enter the land, we must admit that the said Secretary did err in this case and that he interpreted the law correctly in the Sjoli case.

Since Sjoli had not made his application to enter the land, when the company applied to select it in 1885; under the decision in the Tarpey vs. Madsen case, Supra, it was not distinguished in any respect from the status of the land in the Wass case, when he applied for homestead entry in 1899.

The Wass case and the Sjoli case, therefore, were both alike, and in the same status, when each of the entrymen made his application at the local land office to initiate his claim; as the Secretary's erroneous approval of the company's application to select the land in the Wass case, was a mere nullity. That is, in other words, we may say, truthfully, that the Secretary of the Interior never approved the company's application to select the land in the Wass case, as required by law. Had this Wass case received the careful attention

it was entitled to, when in the Land Department for adjustment, it would have appeared, as in the Sjoli case, that a homestead right had already attached to the land, and that, therefore, it was not then subject to selection or to approval as indemnity land.

Since the Sjoli case and the Wass case are alike in all material respects, we insist that the decision in the Sjoli case should dispose of the Wass case also.

III.

The common law fiction of relation does not apply in the case at bar.

The best answer to the contention that the common law fiction of relation applies in this case, so as to make the Secretary's approval, in 1905, relate back and make the selections valid as if the date of the applications in 1892; is found in the Sjoli case, Supra.

> "The company's unapproved selections did not, therefore, stand in the way of the lands being occupied and entered under the homestead law. On the contrary, notwithstanding the filing of such lists, they remained open, as before, to settlement, or occupancy under those laws, until the selections were formally approved by the Secretary of the Interior, and the lands withdrawn from settlement and sale."

As hereinbefore shown, the rule in the Sjoli case is announced in a number of other cases including:

Kansas Pacific R. R. Co. vs. Atchinson R. R. Co., 112 *U. S.*, 414;

United States vs. Missouri K. & T. R. R. Co., 141 *U. S.*, 358.

Oregon and California R. R. Co., vs. United States, 189 *U. S.*, 100;

Wisconsin Central Railroad Co., vs. Price Co., 133 *U. S.*, 496;

Humbird vs. Avery, 195 *U. S.*, 480;

Brandon vs. Ard, 211 *U. S.*, 11.

Directly in point, also, is the case of Flint and Pere Marquette Railway Company vs. Gordon, 41, Michigan 420, in which case Judge Thomas M. Cooley, speaking for the court, said:

> "That doctrine is remedial, and is used in the law to prevent wrong and punish trespass. As has been repeatedly declared in this Court, it can never be so applied, as to make that wrong which was innocent when done, or so as to divest rights, which, by sanction of law, have been acquired since the time from which the relation dates."

In construing a land grant, and in construing the homestead law, the will and intention of Congress, not common law fictions, must be kept in view.

Missouri, Kansas & Texas R. R. Co., vs. Kansas Pacific R. R. Co., 97, *U. S.*, 491.

United States vs. Southern Pacific Railroad Co., 146 *U. S.*, 570;

Wisconsin Central R. R. Co., vs. Forsyth, 159 *U. S.*, 46.

In the case of the Missouri, Kansas and Texas Company, Supra, the Court declares:

> "It is always to be borne in mind, in construing a congressional grant, that the act by which it is made, is a law as well as a conveyance, and that such effect must be given it, as will carry out the intent of congress That intent should not be defeated by applying to the result the rules of the common law, which are properly applicable only to transfer between private parties. To the validity of such transfer it may be admitted that there must exist a present power of identification of the land, and that where no such power exists, instruments, with words of present grant, are operative, if at all, as contracts to convey, but the rules of the common law must yield in this, as in all other respects, to the legislative will."

The will of congress, then, as interpreted by the Courts, is the thing to be kept in view in determining this matter. The intent of congress, in all of its acts dealing with the public lands, has been to give a preference right to the individual settler. This intent is seen in the preemption laws, it is seen in the homestead laws, and it is seen in each and every of the several congressional acts, granting public lands in aid of the construction of railroads.

In the preemption and in the homestead laws the intention of Congress is obvious and needs no exposition. In the railroad land grants, care has been taken to expressly except from the operation of the grant, all those tracts within the primary limits, occupied by settlers claiming under the preemption

and homestead laws, prior to the definite location of the line of road.

Since Congress excepted from the operation of the grant all tracts thus occupied and claimed within the primary limits, it is reasonable to assume that they would not change the rule within the indemnity limits, where the lands were not granted to the Company.

Had it been practicable for Congress to have kept the administration of the indemnity provisions of the land grant in its own hands, there can be no doubt, that the settler upon odd numbered sections, claiming under the homestead law, prior to their selection by the Company, in the manner prescribed, would have been given, like those in the place limits, a prior right as against the Company, and it is a reasonable inference that in delegating authority to the Secretary of the Interior to act for them, they would have him carry out their intention in that respect.

That the intention of Congress is and always has been, to give the actual settlers upon public lands a prior and superior right over other persons or paties, has been frequently declared by the Court.

In the case of *Clements vs. Warner*, 65 *U. S.*, 394, the Court said:

> "The policy of the Federal Government, in favor of settlers upon public lands, has been liberal. It recognizes their superior equity to become the purchasers of a limited extent of land comprehending their improvements, over that of any other person."

This decision rendered in the year 1861, before the enactment of the homestead law, and relating to a preemption claim, speaks of the settler's superior equity to purchase a limited extent of land as a home. But in the subsequent case of *Ard vs. Brandon*, 156 *U. S.*, 537, involving the right of a homestead entry, after declaring that the law deals tenderly, with one, who, in good faith, goes upon public land, with a view of making a home thereon, the Court adopts and incorporates, into the Ard vs. Brandon decision, the above citation from the case of Clements vs. Warner.

The case of *Clements vs. Warner* and that of *Ard vs. Brandon* are referred to approvingly by the Court in the later case of

Northern Pacific Railroad Company vs. Amacker, 175 *U. S.*, 563, and in the case of *Tarpey vs. Madsen*, 178 *U .S.*, 214, thus showing that, after its long and varied experience in dealing with this class of cases, the Court holds as well settled, the principle that the intent of Congress is, and always has been, to give the actual settlers upon public land and, in good faith, claiming for himself a home, a prior and superior right over any other person or party. And this, it seems to us, ought to settle, against the contention of the Company, their claim to the land in suit, under or by virtue of the aforesaid fiction of relation.

The case of *Shepley vs. Cowan*, 91 *U. S.*, 330, is cited by opposing counsel as a case in point illustrating the operation of the fiction of Relation, in

cases similar to the case at bar. But an examination of that case will reveal the fact (1) that the Shepley case is not similar to the case at bar, and (2) that the decision in that case rests upon the act of Congress approved March 3, 1853, 10 Stat. at L. 244, Chap. 143, rather than upon the aforesaid *fiction of relation*

The land in question in the Shepley case was embraced in the confirmed French grant made to the Village of Carondelet before the date of the Louisiana Purchase. As such confirmed French grant it was not a part of the public domain in 1835, when the individual claimant offered his preemption filing, or in 1849, when the State of Missouri selected it on account of its swamp land grant.

In 1862, this Court held the French grant invalid so far as the Shepley claim was concerned, and, owing to the facts in the case, the tract fell under the operation of the act of March 3, 1853, above cited and the relevant part of which reads as follows:

> "And provided further, that any settler who has settled or may hereafter settle on lands heretofore reserved on account of claims under French, Spanish or other grants, which have been or shall be hereafter declared by the Supreme Court of the United States, to be invalid, shall be entitled to all the rights of preemption granted by this act, and the act of fourth of September, eighteen hundred and forty one entitled 'An act to appropriate the proceeds of the public lands and to grant pre-

> emption rights,' after the lands shall have been released from reservation, in the same manner as if no reservation existed."

After the land in the Shepley claim had been released from the reservation by a decision of this Court, the heirs of Chartrand, claimed and secured the land under the act of Congress, and the fiction of relation was not needed in the decision of the case.

Selections by the state on account of its swamp land grant, the filing of a preemption statement by an individual, the making of a homestead entry by a qualified claimant, and the filing of the map of the definite location of its line of road, by a railroad company, all rest upon the same authority, an act of Congress, and all fall under the operation of the same rule, as to the attachment of right and the vesting of title.

In neither of these cases does the attachment of right or the vesting of title depend upon the action of the Secretary of the Interior, or upon the action of any other officer of the Land Department; but the attachment of such right and the vesting of such title springs directly out of the act of Congress, in pursuance of which the claim is made, when followed up by a compliance with the provisions of such act.

In such cases the initiatory steps taken by the claimant, when followed by a compliance with the law, extends forward and requires, not a title, for the claimant has that, but record evidence of title.

The only service the officers of the Land Department can render in such cases is to mark upon their records the description of such tracts of land as were designated and made certain by the state selection, the preemption filing, the homestead application, or the railroad map of definite location, and to issue as record evidence of title, such lists, certificates, or patents as are usual in such cases.

What I mean to say here is that the action of the Secretary is not discretionary in any of these four cases, he has only ministerial work to perform, and his action does not relate back in any way to affect the attachment of right or the vesting of title. These are controlled exclusively by the act of Congress and the action of the claimant.

Therefore it is true that, when a state swamp land grant selection and a preemption filing for the same tract of land are in conflict as in the case of Shepley vs. Cowan, that one which is first in time is first in right.

The act of March 3, 1853, granted the heirs of Chartrand a prior right on account of the settlement and declaration of their ancestor, in 1835. That act of Congress, and not the fiction of relation, decided the case in their favor.

In the case at bar the claim of the settler and the claim of the Company have not a common origin. The settler takes directly under the act of Congress, the homestead law, while the Company takes, if at all, under the act of the Secretary of

the Interior, in pursuance of the indemnity provisions of the grant.

The settler having occupied the land and applied to enter it as a homestead in the year 1899, his right attached and his title vested as of that year, and, having been followed up with a full compliance with the law, his right and title so initiated, reaches forward and requires the issue of a patent in his favor, after the expiration of five years, unless the land was previously embraced in some superior valid claim.

The Company's unapproved selection lists is all that stood in the way of the allowance and approval of the Wass entry. As we understand the law and the ruling of the Court, the Company gained no right by merely filing its lists of applications, nor could any right attach in favor of the Company until the lists were approved by the Secretary of the Interior.

In the case at bar the approval of the Secretary was not given until the month of February, 1905, which was more than five years after the right of the settler had attached and the title had vested in Fred Wass, under the operation of the homestead law.

If the rule "first in time, first in right," is sound in law, as argued by opposing counsel, then there can be no doubt that the settler, Fred Wass, holds the land under that rule.

It is not an answer to this to say that we are taking for granted the very point in issue, or that

we are begging the question, since the rule we are contending for and relying upon here, which is that lands, within the indemnity limit, were never granted to the Company or to the state by Congress, and that the only right that can attach to such lands in favor of the Company, originates, not in the act of Congress, not in the act of the Company, but in the act of the Secretary of the Interior, has been repeatedly declared by this Court, as we understand the language of the decisions hereinbefore cited.

From all of which it appears that the case of Shepley vs. Cowan is not in point, and that the doctrine of relation cannot apply to the case at bar.

The case of *McCreery vs. Haskell*, 119, *U. S.*, 327, is also cited in support of the contention that the doctrine of relation applies in such cases as the one at bar. But this decision was rendered under the provisions of an act of Congress approved July 23, 1866, for the quieting of land tites in California; 14 Stat. at L. 218; Section 6, of which reads as foilows:

> "And be it further enacted that an act entitled "an act to provide for the survey of public lands in California, the granting of preemption rights and for other purposes" approved March 3, one thousand, eight hundred and fifty-three, shall be so construed as giving the State of California the right to select for school purposes, other lands in lieu of such sixteenth and thirtysixth sections as were * * * covered by grants made under Spanish

> and Mexican authority * * * or where such sections would be so covered if the lines of the public survey were extended over such lands, which shall be determined * * * in case of Spanish or Mexican grants, when final survey of such grant shall have been made. The surveyor general for the State of California shall furnish the state authorities with lists of such sections so covered, as a basis of selection, such selection to be made from surveyed lands, and within the same land district as the section for which the selection is made."

It appeared upon the plat of the survey made under the direction of, and approved by the surveyor general for the State of California, and filed in the District Land Office at San Francisco, that section sixteen and thirty-six of the township, were embraced in the confirmed Mexican grant known as "Sausal Redondo Rancho," were set off to the grantee in pursuance to the act of Congress above mentioned, were thus lost to the state from its grant for school purposes, and were thus officially designated as a proper basis for the selection of lieu land to the extent of these two sections.

It appears also that, after the surveyor general for the State of California, had furnished the state authorities, lists showing sections sixteen and thirty-six of the township covered by a confirmed Mexican grant, and set off to the grantee as required by law, the state, on the 22nd of April, 1868, selected, in part satisfaction of the loss in section sixteen the tract of land afterwards settled upon and claimed by McCreery under the preemption law.

The land thus selected by the state was public land, within the same land district as the section lost, and entirely free from all other claims or rights at the date of the selection as above mentioned. This selection in behalf of the state was made more than a year and a half before McCreery settled upon the land or otherwise attempted to initiate his claim thereto under the preemption law.

The right of the state to make this selection and the right of the individual to take the land under the preemption law have a common origin. They each rest upon an act of Congress and neither of them is dependent upon the action or the discretion of the Secretary of the Interior. When followed up by a compliance with the provisions of the act under which it is made the selection of the state or the filing of the individual, *whichever* is *first* in *time* is *first in right*, *reaches* forward to the fulfillment of the law, and requires, as a right, from the proper officers of the Land Department, record evidence of the descriptions of the land, in which their right has attached and their title vested under the act of Congress.

Wright vs. Roseberry, 121 *U. S.*, 488.

Since, then, the officers of the Land Department had no discretion to exercise in the McCreery case and rendered therein only ministerial service, it is idle to say that their action relates back in any direction, any distance, or for any purpose.

In the case at bar the settler takes under the act of Congress, the Company under that of the Secre-

tary, and the case of McCreery is far from being in point.

Neither is the case of Campbell vs. Doe, 13 *How.*, 244, in point. In that case the Secretary of the Treasury, under whose jurisdiction such matters then were, had authorized and directed the selection of this land for school purposes, before Campbell was inadvertantly allowed to enter it. And, therefore, the selection for the state was first in time.

Other cases cited to support the fiction of relation are widely distinguished from the case at bar.

In the case of *Gertgens vs. O'Connor*, 191 *U. S.*, 237, the settlement of Gertgens upon the land was made after the approval of the act of Congress of March 3, 1887 (24 Stat. 556) and as this statute expressly provides that, in case the land in dispute is not of the class that may be lawfully patented to the railroad company, then the party having contracted to purchase it from the railroad company, shall have a prior right to purchase it upon the terms and conditions stated in said act of March 3, 1887. The right of such purchaser, therefore, attached immediately and directly under this act of Congress. And the Fiction of relation has nothing to do in that case.

In the case of the*United States vs. Anderson*, 194, *U. S.*, 394, the action was brought to recover damages for a trespass committed upon the land in question by the removal therefrom of a considerable quantity of iron ore and valuable limestone

rock. And damages for tresspass in cutting and carrying away valuable timber, was the cause of the action in the case of *Musser vs. McRal*, 44 *Minn.*, 343.

Neither of the two cases last above mentioned is similar to the case at bar; and each of them is so widely distinguished from it as to need no further attention from us.

In such search as we have been able to make, we have been unable to find in the reports of this court, any case similar to the one at bar, where the land has been awarded to the Company, and the claim of the settler rejected under the operation of the fiction of relation. And, since no such case has been cited by opposing counsel, the inference is very strong, that there is no such case in the reports.

In arguing the case thus far, no attention has been given to the decisions of the United States Land Department, for the reason that those decisions are not in harmony with the decisions of this Court; they are not always in harmony with each other, and in so far as they are in conflict with the Court decisions cited in support of this defendant's case here at bar, they are without weight and properly disregarded.

IV.

Defendant's right to possession of this land is in no way affected by the refusal of the Register

and Receiver of the local United States Land Office to approve and allow application when it was prevented as aforesaid, in 1899.

Ard vs. Brandon, 156, *U. S.*, 537;

Shepley vs. Cowan, 91, *U. S.*, 330;

Frisbie vs. Whitney, 76, *U. S.*, 187;

Syttle vs. Arkansas, 9 *How.*, 314;

Wirth vs. Branson, 98, *U. S.*, 118;

Stark vs. Stark, 6, *Wall.*, 402.

It appears, from an examination of the authorities cited in the foregoing pages, that the land in suit, was not granted to the Territory or to the subsequent State of Minnesota to aid in the construction of railroads or for any other purpose whatever. Nor does it appear to have been reseved for the benefit of any railroad company by the indemnity provisions of the land grant in question. It was open, therefore, to occupancy and entry under the homestead law, when Wass applied for it, at the local land office in 1899, and the presentation of his application operated to segregate his claim from the public domain, so that, thereafter, it was not open to selection or to approval as indemnity land.

Fred Wass is claiming the land in issue, under the homestead law, and by virtue of his compliance in all respects with the provisions of the same.

His qualifications, good faith and compliance with the law are not disputed or questioned in the pleadings, but are fully admitted by the filing of

a demurer to his answer in the trial Court as exhibited in the record.

Accordingly we ask that the order and decree of the Supreme Court of the State of Minnesota be affirmed in all respects, and that the prayer of defendants in their answer made, be granted and allowed.

From the authorities examined in the preparation of this case it seems well settled that lands within the indemnity limits of a railroad land grant are open to occupancy and entry under the homestead law until the railroad company's appli cation to select them as lieu land has been approved as required by law.

From an examination of the several Status having a bearing upon the status of this land involved in the Wass case, as well as from an examination of the adjustments of these several gronts made by the Department in 1891 and in 1903, the Plaintiff had reason to know and did know that the State was not entitled to the tract here in suit, under the act of March 3, 1857, or under any other act.

It seems, therefore, that this action is brought in the first place, and afterwards appealed from Court to Court for the purpose of Delay, for the purpose of making the Defendants such expense and costs as they could neither afford nor provide, for the purpose of intimidating and disheartening neighbors who might have claims of a similar nature, so that they would abandon their rights, give up their

claims under the homestead law, and purchase the land from the company at an exhorbitant price.

In view of all of which, if it happen that the decision of the State Court is affirmed, we ask the Court to allow defendant in Error under rule 23 of the rules of court, such sum as damages as will compensate them for the outlay they have incurred in defending their homestead and require plaintiff in error to pay such damages as a part of the cost of the case.

P. B. GORMAN,
Solicitor for Defendant in Error,
St. Cloud, Minn.

INDEX

	Page
Statement	1
Questions Involved	5
Argument	7
Act March 3, 1857	7
Joint Resolution July 12, 1862	10
Act March 3, 1865	11
Act March 3, 1871	16
Act March 3, 1887	17
Letter Secretary Noble, June 10, 1891	18
Lettery Secretary Noble, October 1, 1891	26
Letter Secretary Hitchcoek, February 25, 1903, 32 Ladd Decisions 21	36
St. Paul and Pacific Railroad Company vs. Northern Pacific Railroad Company	38
Wisconsin Railroad Company vs. Price County	44
Sjoli vs. Dreschel	47
Humbird vs. Avery	47
Brandon vs. Ard	48
Ryan vs. Central Pacific Railroad Company	40
Cedar Rapids Railroad Company vs. Herring	41
Kansas Pacific Railroad Company vs. Atchison, Topeka and Sante Fee	41
Tarpe vs. Madsen	49
Sioux City and St. Paul Railroad Company vs. Chicago, Milwaukee and St. Paul Railroad Company	43
Flint and Pere Marquette Railroad Company vs. Gordan	53
Clements vs. Warner	55
Shepley vs. Cowing	56
McCreery vs. Haskell	61
Gertgens vs. O'Connor	64
Campbell vs. Doe	64

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Department of the Interior,

WASHINGTON, JANUARY 10, 1911.

E-4038.

02643-02644.

FLORENCE A. COFFIN, ASSIGNEE OF BENJAMIN F. ABELL, AND THE HEIRS OF ALLEN A. DIXON, ALIAS DIXON GARNER,

vs.

CHARLES A. MOORE, WILLIAM MILLEN, NORTHERN PACIFIC RAILWAY CO. ET AL.

Petition Invoking the Supervisory Authority of the Secretary of the Interior.

This case involves the N. W. ¼ of the N. W. ¼ and S. ½ of the N. W. ¼ of Sec. 5, T. 53 N., R. 11 W., Duluth, Minnesota, land district, and is before the Department on the petition of Florence A. Coffin, invoking the supervisory authority of the Secretary of the Interior, and requesting a consideration of her claim to said land, based on soldiers' additional homestead applications which, while of record in the General Land Office, were not considered by the Depart-

ment at the time the previous decision affecting said land was rendered.

It appears that the land involved was selected by the Northern Pacific Railway Company, October 17, 1883, as second indemnity, which selection was canceled March 11, 1897, but the cancellation rescinded May 26, 1900, in view of the decision of the Supreme Court in 177 U. S., 435; that on March 12, 1907, the selection was again canceled, and the cancellation suspended by the General Land Office under date of April 1, 1907; that such suspension was removed, and the company's selection finally canceled November 9, 1909.

It is further shown that in the meantime, and while the land was covered by the railroad company's selection, Charles A. Moore, on October 25, 1895, presented a timber and stone application for said tracts, together with an adjoining lot, which was rejected because of the company's pending selection; that Moore, on September 21, 1901, again presented the timber and stone application for the said lands, which was also rejected because of the company's selection; that on August 24, 1896, Joseph McMahon filed homestead application for said tracts, and on November 12, 1896, William Millen filed homestead application for said tracts, which were rejected for reason of conflict with the company's claim and other pending applications.

By decisions rendered August 15 and December 9, 1901, the Commissioner of the General Land Office awarded to Moore the right to complete his timber and stone application, which action was affirmed by the Department's decision of February 13, 1907, in the case of Charles A. Moore and J. L. Picotte against the Northern Pacific Railroad Company. Millen and McMahon filed motions for review of the Department's decision of February 13, 1907, which were denied October 20, 1909, on the ground that there had been no error in the Commissioner's decision of December 19, 1901, awarding the right of entry to Moore, but the Depart-

ment directed further that if Moore should fail to purchase within sixty days after notice, lot 4 and the S. ½ of the N. W. ¼, the tracts involved in Coffin's applications, would be subject to disposal, at which time the respective claims of Millen and McMahon would then be considered.

February 25, 1910, Moore submitted proof on his timber and stone application, at which time Millen filed a motion in the district land office to dismiss the proof. This motion was denied because the protest upon which it was based was not verified, and Millen appealed to the General Land Office. The register and receiver, while dismissing Millen's protest against the proof of Moore, declined, in view of the former's appeal, to issue final certificate to Moore, but he was allowed to make payment for the land. It was at this stage of the proceedings that a petition was filed on behalf of Florence A. Coffin, invoking the supervisory authority of the Secretary of the Interior and requesting a consideration of her soldiers' additional applications which were filed in the local land office March 20, 1907, and without knowledge of which the Department's decision of October 20, 1909, was rendered.

While it appears that other parties had at some time filed applications for these lands those now before the Department are Charles A. Moore, the timber and stone applicant, who has been allowed to submit proof and make payment, but to whom no certificate has issued; Joseph McMahon, who is asking for a reinstatement of his homestead application; William Millen, who is urging the acceptance of his homestead application originally filed in 1895 and recently renewed; and the petitioner, Coffin. It appears from a statement contained in the letter of the Commissioner of the General Land Office transmitting the record, that the lands have been again applied for by the Northern Pacific Railway Company, whose application was rejected and as a result of which an appeal was taken from the decision of the Commissioner of the General Land Office, where the case is now pending.

It is urged in behalf of Moore that the case is *res adjudicata;* that the Department's decisions of 1907 and 1909 awarding him the preference right of entry finally disposed of all questions respecting the right to make entry of this land. It is claimed in Moore's behalf that he has for nearly fifteen years been involved in litigation respecting this land, has never been in laches, and should be permitted to perfect his claim.

It is urged on behalf of Millen, the homestead applicant, that the claim of Moore is invalid because when originally presented in 1895 the land was offered, and that such land was not subject to timber and stone entry; that the act of May 18, 1898 (30 Stat., 418), while abolishing the difference between offered and unoffered lands, could not have the effect to rehabilitate the invalid application of Moore presented in 1895; and in so far as Moore's later application is concerned it is urged in Millen's behalf that the same must be subject to the latter's prior homestead application.

It is urged on behalf of the petitioner, Coffin, that her applications being the first presented after the cancellation of the railway company's selection, is in fact the only legal application pending for said land and should be allowed; that no rights were acquired by any application presented at the time when the land was covered by the railroad company's indemnity selection; that the ruling of the Department on this question has been uniform for a long period of time and is conclusive; and that the decision of the Department rendered in 1909 without knowledge of petitioner's pending application is in no sense binding upon her, one of the essential elements of the rule of *res adjudicata* being absent from the case, in that Coffin's claim was not considered when the decision was rendered, the Department being in absolute ignorance thereof.

It is true that an indemnity selection presented by a railroad company is not effective against the United States until approved by the Secretary of the Interior; that the Sec-

retary's approval is essential to the validity of any such selection, as the statute provides that indemnity selections must be made under his approval. At the same time, however, it is absolutely necessary to a proper administration of the land laws that there should be some rule respecting the segregative effect of a railroad company's indemnity selection until such time as it can receive proper consideration from the officers whose duty it is to dispose of the same. Having under consideration the necessity for, and effect of, rules of the land department, the Circuit Court of Appeals for the Eighth Circuit has held that it is essential to the impartial exercise of such power as exists in the land department that rules and regulations should be adopted and steadily maintained establishing a uniform practice and method of procedure; that the legislation of Congress was ample for the establishment of such rules, and when promulgated they become a law of property and cannot be ignored by the Department to the subversion of rights acquired under them; and, further, that an established rule of practice of the land department that after a decision by the Secretary has been made canceling an entry of public lands, no subsequent entry of such lands can be made until a decision has been officially communicated to the local land officers and a notation of the cancellation made on their plats and records, is a proper, just, and reasonable rule and is in accordance with the policy of Congress which makes the local offices the place for the initiation and establishment of all claims under its laws. See Germania Iron Company *vs.* James *et al.* (87 Fed. Rep., 811).

The ruling of the Department in cases involving indemnity selections presented by railroad companies and others, is that such selections have a segregative effect if *prima facie* valid, and while pending the land is not subject to any other entry or selection. See Vold *vs.* Northern Pacific Railway Co. (38 L. D., 378), and the recent case of

Aztec Land and Cattle Co. *et al. vs.* Dewer *et al.*, decided December 14, 1910 (not reported).

From what has been stated it will be seen that at the time of the presentation of Moore's timber and stone application in 1895 this land was covered by a *prima facie* valid indemnity selection; that it was so covered at the time of the presentation of the homestead applications of Millen and McMahon in 1896; and that under the ruling cited no rights were initiated by the tender of such applications. At the time of the presentation of the soldiers' additional homestead claim of Florence A. Coffin the railroad company's indemnity selection had been canceled and the land was subject, so far as the record shows, to her soldiers' additional claim.

Having under consideration the effect of the railroad company's selection of lands embraced in the list which was canceled, and the order of cancellation temporarily suspended, the Department held in its decision of March 26, 1908 (Northern Pacific Railway Co., 36 L. D., 328), that all rights initiated upon these lands under any of the public land laws, at a time when they were freed from pending selections and subject to appropriation, will be protected. It is sufficient to say, therefore, that if at the time of the Department's decision of October 20, 1909, the Department had been advised of Coffin's pending application, that decision would not have been rendered, and anything said therein contrary to the views expressed here is recalled and vacated and the case remanded for consideration on the entire record.

(Signed) FRANK PIERCE,
First Assistant Secretary.

[10192]

WEYERHAEUSER *v.* HOYT.

APPEAL FROM THE CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

No. 24. Argued April 27, 28, 1910.—Restored to docket for reargument December 19, 1910.—Reargued January 19, 20, 1911.—Decided February 20, 1911.

It was the purpose of Congress, as evidenced by the original Northern Pacific Land Grant Act of July 2, 1864, c. 217, 13 Stat. 365, and the joint resolution of May 31, 1870, 16 Stat. 378, extending the indemnity limits, to confer substantial rights to the lands within the indemnity limits in lieu of those lost within place limits.

The right of the company to lieu lands lawfully embraced in selections filed with the Secretary of the Interior excluded lands to which rights of others had attached before the selection and also excluded

the right of others to appropriate lands so embraced in such selections pending action by the Secretary.

The power of the Secretary to approve selections is judicial in its nature, and implies the duty to determine as of the time of filing the selection and the doctrine of relation applies to decisions as to validity of such selections.

In this case *held*, that the company's rights to lieu lands embraced in a selection were superior to those of a purchaser under the Timber and Stone Act who filed pending final decision by the Secretary and between the time of decision of the Secretary holding that the selections were unlawful and the subsequent reversal of that decision; and that the final decision related back to the date of the original selection. *Sjoli* v. *Dreschel*, 199 U. S. 564, distinguished.

General expressions in every opinion are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but they are not controlling when the very point is presented in a subsequent case.

General expressions in an opinion such as those in *Sjoli* v. *Dreschel*, 199 U. S. 564, will not be made the basis for overthrowing a uniform rule of the Land Department, involving destructive effects upon property rights existing under different conditions.

The contention in this case, overruled by the Secretary, that the company was not entitled to lieu lands within indemnity limits because not on the same side of railroad as the place lands lost, held to be without merit.

Where a matter regarding selection of lieu land is wholly within the jurisdiction of the Secretary deciding it, this court will assume that the facts on which the decision rested were properly proved.

Humbird v. *Avery*, 195 U. S. 485, followed as to construction of provisions of Sundry Civil Act of July 1, 1898, c. 546, 30 Stat. 597, 620, and decision of Secretary in this case sustained; but *quære* and not decided, as to effect of such provisions on purchasers under the Timber and Stone Act.

Where the object of the bill is to charge the defendant as trustee of land included in lieu limits of a railway grant for the complainant, if it appears that a valid selection was made, proof that defendant's grantor never acquired title to the land would not establish complainant's right to it.

161 Fed. Rep. 324, reversed.

THE facts, which involve the construction of the Northern Pacific Land Grant Acts, are stated in the opinion.